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1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SACRAMENTO

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4 HON. STEVEN H. RODDA, JUDGE, DEPARTMENT 44/1

5 ---oo---

6 LAURENCE LUCIER and LAURIE LUCIER, )  
7 Plaintiffs, )  
8 -vs- ) No. 02AS01909  
9 PHILIP MORRIS INCORPORATED, and, )  
R.J. REYNOLDS TOBACCO COMPANY )  
10 Defendants. )  
11 )

12 ---oo---

13 REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS AT JURY TRIAL

14 ---oo---

15 TUESDAY, DECEMBER 10, 2002

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7 DAVID F. LUCIER

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1 TUESDAY, DECEMBER 10, 2002  
2 (Morning Session)  
3 ---oo---

4 The matter of LAURENCE LUCIER and LAURIE LUCIER, et  
5 al, Plaintiffs, versus PHILIP MORRIS INCORPORATED, et al.,  
6 Defendants, Case No. 02AS01909, came on regularly this day  
7 before the Honorable Steven H. Rodda, Judge of the Superior  
8 Court of the State of California, for the County of  
9 Sacramento, Department 44/1 at 9:30 o'clock a.m.

10 The Plaintiffs, LAURENCE LUCIER and LAURIE LUCIER,  
11 were represented by: GARY M. PAUL, Attorney at Law;  
12 MARY ALEXANDER, Attorney at Law; and ROBERT M. BROWN,  
13 Attorney at Law.  
14 The Defendant PHILIP MORRIS INCORPORATED was

15 represented by: GERALD V. BARRON, Attorney at Law;  
16 LAURA C. FEY, Attorney at Law; STEPHANIE A. SCHRANDT,  
17 Attorney at Law; DEBORAH A. SMITH, Attorney at Law;  
18 and ANNIE Y.S. CHUANG, Attorney at Law.

19 The Defendant R.J. REYNOLDS TOBACCO COMPANY was  
20 represented by: THEODORE M. GROSSMAN, Attorney at Law;  
21 HAROLD K. GORDON, Attorney at Law; ELIZABETH P. KESSLER,  
22 Attorney at Law; DANIEL J. McLOON, Attorney at Law,  
23 and STEVEN N. GEISE, Attorney at Law.

24 The following proceedings were then had:

25 ---oo---

26 THE COURT: Okay. Set to go?

27 MR. PAUL: We are, your Honor.

28 MR. GROSSMAN: Yes.

6098 1 THE COURT: Okay, bring the jury in.

2 (The jurors are brought in at 9:31 am.)

3 ---oo---

4 THE COURT: Good morning.

5 (All say "good morning.")

6 ---oo---

7 THE COURT: Okay, Mr. Paul.

8 MR. PAUL: Thank you very much, your Honor.

9 Good morning, everybody, on this nice, wet rainy day.

10 I would like to call David Lucier, please.

11 THE CLERK: Please take the witness stand.

12 Raise your right hand.

13 Do you solemnly swear the testimony that you shall  
14 give will be truth, the whole truth and nothing but the  
15 truth, so help you God?

16 THE WITNESS: I do.

17 THE CLERK: Be seated.

18 THE WITNESS: Thank you.

19 THE CLERK: Please state your full name and spell it  
20 for the record.

21 THE WITNESS: My name is David F. Lucier,  
22 L-U-C-I-E-R.

23 THE CLERK: Thank you.

24 TESTIMONY OF

25 DAVID F. LUCIER, a witness called by the Plaintiffs:

26 DIRECT EXAMINATION

27 BY MR. PAUL, Counsel for the Plaintiff:

28 Q. Mr. Lucier, how are you this morning?

6099

1 A. Good, thanks.

2 Q. Do you know someone by the name of Larry Lucier?

3 A. Yes, I do.

4 Q. Who's Larry Lucier?

5 A. He's my brother.

6 Q. We're going to start off with some basic information  
7 about you.

8 How old are you?

9 A. I'm 54.

10 Q. And what is your date of birth?

11 A. January the 14th, 1948.

12 Q. And where do you now reside, sir?

13 A. Tempe, Arizona.

14 Q. Do you have a number of brothers and sisters?

15 A. Ten.

16 Q. Going to put your memory to the test here.

17 Who is the oldest?

18 A. My sister E'louise.

19 Q. And her name is spelled E apostrophe --

20 A. -- -L-O-U-I-S-E-

21 Q. And how much older -- How old is she?

22 A. She's about 14 months older than I am, 15 months  
23 older than I am.

24 Q. You come from a good Catholic family, right?

25 A. I do.

26 Q. Okay. Who's next?

27 A. Myself, I'm number two.

28 Q. All right. And who's number three?

6100  
1 A. My Sister Suzanne.

2 Q. And how much younger is Suzanne than you?

3 A. Well, about 13 months.

4 Q. Is that going to be sort of consistent?

5 A. On average, it goes from oldest to youngest, 13  
6 people -- Excuse me, 11 people in 13 years.

7 Q. Okay. And then after Suzanne?

8 A. Larry.

9 Q. So, he's about two years younger than you?

10 A. Yes, that's correct.

11 Q. And then after Larry?

12 A. My Sister Therese.

13 Q. And after Therese?

14 A. Brother Phillip, with two L's.

15 Q. And after Phillip?

16 A. Charles. And Mary Jane, Bernadette, Barbara, and  
17 Jeanette.

18 Q. Are you guys a close family?

19 A. As near as I can tell, I think we're pretty close.

20 Q. You live in different areas, don't you; is that  
21 correct?

22 A. Yes. Let's see, my sister Therese lives in Seattle.

23 I have two sisters that currently reside in north  
24 county, San Diego, north county of San Diego, and a brother

25 that lives right outside of Dallas.

26 And the balance of the brothers and sisters live in  
27 and around the Phoenix metropolitan area.

28 Q. And Larry lives here in Sacramento?

6101  
1 A. And Larry lives here in Sacramento.

2 Q. Let's talk a little more about you.

3 What's your business?

4 A. I work as a property manager for large apartment  
5 complexes and -- In the Phoenix Arizona, metropolitan area.

6 Q. Do you have a college education, sir?

7 A. I do. I graduated in '74, from Arizona State  
8 University. In Tempe.

9 Q. You served in the military at one point?

10 A. Yes. From February, 1967, until the end of November,  
11 1969, I was in the United States Army Special Forces.

12 Q. In Viet Nam?

13 A. Throughout Southeast Asia.

14 Q. Okay. Are you a smoker?

15 A. No.

16 Q. Were you ever a smoker?

17 A. Yes, I was.

18 Q. When did you start smoking cigarettes?

19 A. Probably took my first cigarette when I was about ten  
20 or 11.

21 Q. And that cigarette, where did you obtain it?

22 A. I believe I took it from an open pack from my  
23 cigarette -- From my parents' cigarette pack.

24 Q. And how long did you smoke?

25 A. Um, I spoked until I was 40, so it was about 1988.

26 I quit in the spring of about 1988.

27 Q. During the course of your lifetime, did you ever  
28 smoke Winston cigarettes?

1 A. Um, I smoked Winston exclusively, with the exception  
2 of probably the first few cigarettes I ever smoked.

3 Q. And you quit, you said, around your 40th birthday?

4 A. That is correct.

5 Q. What made you quit?

6 A. Um, I was afraid of dying. So I -- I quit. I was  
7 living with a woman at the time who had a couple of  
8 children, and we decided that we should stop smoking at that  
9 time.

10 Q. Your mother died in about 1988; is that correct?

11 A. In August of 1988.

12 Q. Did you quit smoking before she died?

13 A. Yes, I did.

14 Q. Now, your mother died of what?

15 A. A cerebral hemorrhage, a stroke, basically.

16 Q. At the time that she died, did you believe that her  
17 death may have been related to smoking.

18 A. There were several conversations, as I recall, with  
19 some of my brothers and sisters regarding that, and we felt  
20 that it was probably attributable -- Probably attributed to  
21 her death.

22 Q. But in any event, it wasn't her death that caused you  
23 to stop smoking; you had stopped smoking before that?

24 A. Yeah. I stopped smoking in the spring of 1988, and  
25 she died in August of -- Mid-August.

26 Q. Now, let's go back to when you were young and you  
27 were smoking cigarettes.

28 Were you allowed to smoke around the house?

6103  
1 A. No, not as a child.

2 Q. Okay. Something that your parents disapproved of?

3 A. Both my parents smoked.

4 Q. No, listen to me; you have to listen to my question,  
5 sorry.

6 A. Okay.

7 Q. Was this something that your parents disapproved of?  
8 Smoking by children in the house?

9 A. Smoking as a child, yes, they did disapprove of that,  
10 yes.

11 Q. So in order to smoke, did you have to secret yourself  
12 from your parents so that you could do that?

13 A. Yes.

14 Q. All right. Were you and Larry Lucier close as  
15 children?

16 A. Yeah. We were a couple years apart and grew up in  
17 the same household, up until -- I left the house.

18 Q. All right. When did you leave the house?

19 A. In -- I graduated high school in June of '66, and I  
20 went to the University of Missouri that fall. So September  
21 of '66 was the first time I left the house.

22 Q. All right. So starting in September, '66, you went  
23 away to college; is that true?

24 A. That's correct.

25 Q. And did you then not return to the house after you  
26 had started your college education?

27 A. I spent a semester at University of Missouri and then  
28 entered the Army in February of '67, and so was no longer  
6104  
1 residing at home.

2 Q. All right. Did you ever return to live in the home  
3 again?

4 A. No.

5 Q. Okay. So once you had left to start at the  
6 University of Missouri and then went into the Army, you  
7 lived away from the home after that; is that correct?

8 A. That's correct.

9 Q. Did there come a time, though, that when you and  
10 Mr. Lucier lived together?

11 A. Yes.

12 Q. When did that occur?

13 A. We lived together several times. Um, in 1970, when I  
14 moved to Tempe, he came to live with me, for several months.  
15 And then again in the early nineties, we lived together in  
16 the Bay Area.

17 Q. All right. For how long did you live together in the  
18 Bay Area?

19 A. Um, probably a total of a couple years.

20 Q. Okay. During that period of time, let's just turn to  
21 the Bay Area for a second.

22 Was he still smoking at that point?

23 A. Yes.

24 Q. And you had stopped smoking by then, correct?

25 A. That's correct.

26 Q. we'll touch more on that in a couple minutes.

27 A. Okay.

28 Q. When he lived together with you in Tempe for a few  
6105  
1 months in 1970, you were smoking at that point?

2 A. Yes, I was.

3 Q. And was he smoking at that point?

4 A. Yes, he was.

5 Q. Okay. Now, do you remember Mr. Lucier smoking as a  
6 child?

7 A. Yes, I do.

8 Q. Do you recall when approximately he started smoking?

9 A. Um, at or about the same time I started smoking --

10 And I started smoking when I was -- (pausing) -- Probably

11 somewhere between -- My first cigarette somewhere between  
12 10 and 12. So he was a couple years younger than I was, so  
13 he may have been ten.

14 Q. So he was born in '50, so that would be around 1960?

15 A. '60, '61.

16 Q. Okay. Do you recall what kind of cigarettes he  
17 smoked as a child?

18 A. No. My earliest recollection is that he helped  
19 himself to my parents' cigarettes as well.

20 Q. Did he ever help himself to your Winstons?

21 A. Yes.

22 Q. Um, what's sometimes called bumming a cigarette?

23 A. Yes.

24 Q. Would you smoke together? In other words, would the  
25 both of you be smoking at the same time?

26 A. Yes.

27 Q. Where did you smoke?

28 A. Wasn't unusual for us to smoke in my room. We had a  
6106  
1 big house; there were a lot of people who lived in it. It  
2 was an old three-story, 1904 home in St. Louis, and all the  
3 boys had their rooms on the third floor. And I'd have some  
4 friends over, and we would play cards and we'd smoke.

5 Q. Well, how did you keep the smoking away from the  
6 attention of your parents?

7 A. Well, there's -- They were on the second floor, and  
8 it was a big house. My room was towards the back of the  
9 house on the third floor. Their room was on the second  
10 floor, toward the front of the house. So there was a degree  
11 of separation.

12 Q. And did your parents smoke also?

13 A. Yes, they did.

14 Q. Both your mother and your father?

15 A. Yes.

16 Q. Do you recall what kind of cigarettes they smoked?

17 A. I believe my mother smoked Kent and my father  
18 smoked -- I think Benson and Hedges.

19 Q. Okay. And so the cigarettes that you sometimes would  
20 take from your parents' pack, this would be Kents or Benson  
21 and Hedges until you switched to Winstons?

22 A. Yes.

23 Q. All right. Now, let's go back a little bit to your  
24 education.

25 You grew up sort of in the Rochester area for awhile;  
26 is that correct?

27 A. Basically my grade-school years from kindergarten to  
28 eighth grade, I grew up in Rochester, New York during that  
6107  
1 period.

2 Q. You would have left Rochester in about what year?

3 A. '60, '61.

4 Q. So you would have been around 12 at that time; is  
5 that correct?

6 A. That's correct.

7 Q. All right. So you would have gone through roughly  
8 the sixth grade by then; isn't that correct?

9 A. No, by -- By that time, I was eighth grade, freshman  
10 in high school.

11 Q. Okay. And in the schools in Rochester, did you go to  
12 public schools, or did you go to Catholic schools?

13 A. I went to a catholic school. It was the parish  
14 church, our Lady of Lourdes.

15 Q. Is that the same school that Mr. Larry Lucier went  
16 to?

17 A. Yes.

18 Q. Bless you. (A juror sneezing).

19 A. Yes, it is.

20 Q. Now, were there health classes in that school?

21 A. I don't recall health classes, no.

22 Q. This school runs by some order of priests or

23 brothers?

24 A. Those were the Sisters of St. Joseph, as I recall.

25 Q. Okay. Do you recall any classes in that school that  
26 taught anything about smoking?

27 A. Not that I recall.

28 Q. After you finished in Rochester, your family moved to  
6108  
1 St. Louis?

2 A. That's correct.

3 Q. All right. And then in St. Louis, did you go to  
4 public schools, or did you go to catholic schools?

5 A. Went to catholic schools again.

6 Q. Okay. And what was the name of that school?

7 A. I graduated from Christian Brothers Military High  
8 School, in Clayton, Missouri, which is a suburb of  
9 St. Louis.

10 Q. That's an interesting combination, Christian Brothers  
11 Military High School?

12 A. It was a junior R.O.T.C., Jr. R.O.T.C. high school  
13 where you wore uniforms and had little military science  
14 classes on occasion. It was a college prep school.

15 Q. Okay. Now, when you went to school, obviously, it  
16 was run by the Christian Brothers, right?

17 A. That is correct.

18 Q. When you went to school, did you have classes in that  
19 school that taught health?

20 A. No, not health specifically. There were some science  
21 classes.

22 Q. Do you recall any classes in that school that dealt  
23 with the subject of smoking and health?

24 A. No, I don't.

25 Q. Okay. Now, did your brother Larry go to that school?

26 A. He went there for two years, I believe. And he  
27 started subsequent to my graduation.

28 Q. Okay. Now, did you ever go to the seminary?

6109  
1 A. Yes. I did spend a year in the seminary at St. Louis  
2 Preparatory Seminary in -- And again in the suburb of  
3 St. Louis.

4 Q. Your parents were really trying to get a priest in  
5 the family, right? But it didn't work?

6 A. No. We tended to go through puberty, as chance would  
7 have it. So -- (pausing)

8 Q. And so it didn't stick?

9 A. No, it didn't.

10 Q. Okay. So in the seminary -- Well, let me go back to  
11 the school, the military school that you were in, Christian  
12 Brothers.

13 Were you allowed to smoke on campus there?

14 A. No, we weren't.

15 Q. Did you smoke on campus?

16 A. I may have smoked on campus on a Friday night at a  
17 football game behind the bleachers or something like that,  
18 but not during school times, no, generally not.

19 Q. Did anyone smoke on campus?

20 A. The brothers smoked on campus, the teachers did. The  
21 teaching staff, there were several smokers on the staff.

22 Q. But the students, when they were in uniform and on  
23 the campus --

24 A. Were not allowed and not permitted to smoke on campus

25 with their uniforms.

26 Q. Okay. Do you ever recall having any discussion with  
27 Larry Lucier during your years you started smoking and he  
28 started smoking through high school where the two of you sat  
6110  
1 down and talked about the hazards of smoking?

2 A. No.

3 Q. Do you remember when the Surgeon General's report  
4 came out?

5 A. Mid-sixties is about as close as I can come.

6 Q. Was that a topic of conversation among the family,  
7 that report?

8 A. I remember a couple of conversations around the  
9 dinner table, as a current event.

10 Q. All right. Did it have any effect on your smoking?

11 A. No.

12 Q. Now, at some point in time, as the years went on,  
13 your -- You're now -- You're now in the military, et  
14 cetera. Were there members of your family that were more  
15 vocal on the subject of smoking and health than others?

16 A. My sister E'louise.

17 Q. She's the oldest?

18 A. She is.

19 Q. She's a nurse?

20 A. Yes, she is.

21 Q. Okay. When I use the term "vocal", what do you mean  
22 by that? In what way was she more vocal?

23 A. She would tell me about the harmful effects of  
24 cigarette smoking, that several studies had been done and  
25 these are some of the consequences: You could come down  
26 with emphysema; you could come down with lung cancer, heart  
27 problems, those types of things.

28 Q. And would she have this conversation with just you

6111

1 alone, or would she have it with other members of the family  
2 as well?

3 A. I don't remember any specific instances, other than  
4 her talking with me about it on occasion generally when I  
5 was standing there with a cigarette in my hand.

6 Q. Have any effect on your smoking?

7 A. Not at the time.

8 Q. Do you know whether she ever had these conversations  
9 with Larry Lucier, let's say, before 1988?

10 A. I don't know.

11 Q. Okay. Now, you indicated in 1988, you quit. You  
12 sort of gave us the background of it. Did you do anything  
13 special to quit?

14 A. I went to a hypnotist.

15 Q. And where was that?

16 A. He was located in Santa Rosa, California.

17 Q. Okay. And did it work?

18 A. Yes, it did.

19 Q. The hypnotist assisted you in stopping; is that  
20 correct?

21 A. Yes, he did.

22 Q. Why didn't you just stop cold-turkey?

23 A. Number one, I was afraid I couldn't. I was afraid of  
24 failure. I didn't think I could.

25 I was -- I was on edge about the possibility of --  
26 Withdrawals, gaining weight, the irritability that I heard  
27 had kind of gone along with it.

28 Q. All right. Did you have to go more than once to a  
6112  
1 hypnotist.

2 A. No. I went once. It was about a two-hour session.

3 Q. And it worked for you?

4 A. And it worked for me.

5 Q. Okay. Did you ever tell Mr. Lucier about your  
6 experience of working with a hypnotist?

7 A. I did. And it -- Again, the timeframe, I don't  
8 recall exactly. But I do remember telling him and a lot of  
9 my family members that I had gone to this hypnotist and the  
10 effect was that I had quit smoking.

11 Q. All right. Did you learn at some point in time that  
12 Mr. Lucier had gone to a hypnotist to try to stop?

13 A. Not until recently.

14 Q. Okay. So you weren't even aware of that?

15 A. No.

16 Q. Okay. Now, at some point in time, did you become  
17 more vocal with Mr. Lucier about his smoking?

18 A. Yes. When we had lived together in the Bay Area, by  
19 that time I had quit smoking. This was the timeframe was  
20 the early 90's. We were living -- It was in the earlier  
21 90's. We were living together. I had quit smoking, and he  
22 was still smoking.

23 Q. All right. And by "more vocal", you use rather  
24 straightforward language, don't you?

25 A. I said to him, as I've said to some, some others --

26 Q. You don't have to say what you said.

27 A. But it was pretty bad.

28 Q. But you used pretty straightforward language?

6113

1 A. I used very straightforward language.

2 Q. Something along the lines, if you don't stop -- maybe  
3 a different word -- that will kill you?

4 A. Right.

5 Q. And his response to that was what?

6 A. "Maybe it will, maybe it won't."

7 Q. He didn't seem convinced by your comment?

8 A. No.

9 Q. Now, did you become aware at some point in time --

10 Did you ever know Mr. Lucier smoked Marlboros?

11 A. Yes.

12 Q. Mr. Larry Lucier. I'm sorry.

13 A. Yes.

14 Q. There are two many Luciers.

15 Mr. Larry Lucier smoked Marlboros?

16 A. Yes.

17 Q. Did you also become aware that he smoked Merit?

18 A. Yes. In fact, I think he spent more time smoking  
19 Merits than he did any other brand that I was aware of.

20 Q. Did you ever become aware that from time to time he  
21 would take the filters off his cigarettes?

22 A. When he was smoking Merit, I remember him doing that  
23 on a regular basis.

24 Q. And what would he do?

25 A. He would take a cigarette from the pack, pull it out,  
26 break it off and throw the -- Throw the filter away, or --  
27 So he just smoked cigarette without the filter.

28 Q. Did he ever tell you why he was doing that?

6114  
1 A. No. But I remember sort of joking about it one time  
2 or bringing it up.

3 Q. And what was that?

4 A. I had just made the comment that, you know,  
5 unfiltered cigarettes, you know -- I can't remember. It  
6 was something sarcastic about his -- About pulling the  
7 filter off and smoking unfiltered.

8 Q. Did you think that your brother was addicted to  
9 cigarettes?

10 MS. FEY: Objection.

11 MR. GROSSMAN: Your Honor, may we approach.

12 THE COURT: Yes, approach.

13 (At Bench)

14 ---oo---

15 THE COURT: Please don't overhear our conversation.

16 MR. GROSSMAN: Your Honor, this calls for a lay  
17 opinion in an area in which expert testimony has been  
18 tendered by the plaintiffs.

19 THE COURT: What's the relevance here, Mr. Paul?

20 MR. PAUL: What's the relevance, whether he thought  
21 he was addicted or not?

22 THE COURT: His subjective state of mind?

23 MR. PAUL: I'll withdraw it.

24 THE COURT: Okay.

25 (Back In Open Court)

26 ---oo---

27 Q. BY MR. PAUL: Mr. Lucier ever indicate to you that he  
28 was having problems in stopping smoking?

6115 1 MR. GROSSMAN: Objection, your Honor; it calls for  
2 hearsay.

3 THE COURT: Reaction?

4 MR. PAUL: State of mind.

5 THE COURT: Overruled.

6 THE WITNESS: Could you repeat the question.

7 MR. PAUL: Sure.

8 Q. Did Larry Lucier ever indicate to you in  
9 conversations that he was having difficulty stopping  
10 smoking?

11 A. Yes.

12 Q. Was he -- Is he still smoking today?

13 A. Yes.

14 Q. He still smokes cigarettes today?

15 A. Yes.

16 Q. You're aware that he's been diagnosed with lung  
17 cancer?

18 A. Yes.

19 Q. He's had surgery on his brain?

20 A. Yes.

21 Q. And he still smokes today? Is that right?

22 A. Yes.

23 Q. Now, did you ever become aware that Mr. Lucier had  
24 tried to use nicotine patches to stop?

25 A. Yes.

26 Q. Is that from talking with Mr. Lucier?

27 A. I believe he used the patch during the period that we  
28 lived together in the Bay Area.

6116

1 Q. Did he ever use nicotine gum to try to stop?

2 A. Yes.

3 Q. You became aware of that correct?

4 A. Yes.

5 Q. But, in any event, it was -- Well, did it seem to  
6 allow him to cut down, using the patch or using the gum?

7 A. Yes, it seemed to be -- He smoked less while he was  
8 on the -- On the patch.

9 Q. Um, now, how often do you see Mr. Lucier? At the  
10 present time?

11 A. I saw him about a year ago. And I saw him -- I'm  
12 staying with him now.

13 Q. All right. Um, other than Larry Lucier, are there  
14 other members of your family that still smoke?

15 A. My Sister Suzanne still smokes, and my Sister Therese  
16 still smokes.

17 Q. So there are three out of the -- Well, how many

18 originally smoked? How many smoked total in the family?

19 A. I'll have to count.

20 Q. Okay.

21 A. I smoked, Suzy, Larry, P.D., that's Therese.

22 Q. Therese is called P.D.?

23 A. We have a lot of nicknames, so sometimes I -- And I  
24 don't use their formal names very often.

25 Q. Does she like being called P.D.?

26 A. P.D. has been known as P.D. all her life. (Laughter)

27 Q. Okay.

28 A. I think eight.

6117

1 Q. So eight out of the 11 smoked?

2 A. Yes.

3 Q. And at the present time, three out of those eight  
4 still smoke, correct?

5 A. Correct.

6 Q. Now, are you a pilot?

7 A. No, I'm not.

8 Q. Is your brother a pilot?

9 A. He -- He received, I think, a private pilot's  
10 license several years ago.

11 Q. This is Larry Lucier?

12 A. That's correct.

13 Q. Have you flown with him?

14 A. Yes.

15 Q. Was your mother a pilot?

16 A. Yes, she was a Women's Air Service Pilot during World  
17 War II.

18 Q. Is your brother a scuba diver, or was he?

19 A. Yes, he was.

20 Q. Qualified and tested and all that stuff?

21 A. Before you can -- Before you can scuba dive

22 unsupervised, if you will, every diver needs to go through a  
23 certification process, and he went through what they call  
24 PADI, P-A-D-I, it stands for professional association of  
25 dive instructors or something like that. But PADI is the  
26 acronym, that certification, and probably the widest  
27 certification in the country.

28 Q. So he's certified?

6118

1 A. He was certified, yes.

2 Q. Would you consider your brother a risk-taker?

3 A. No.

4 Q. At some point in time, did your brother live on a  
5 ranch?

6 A. Yes. At one point my mother bought a ranch in New  
7 Mexico, and he helped run it.

8 Q. Did you ever live on that ranch?

9 A. No. I visited it once or twice.

10 Q. What kind of things went on on that -- Well, that's  
11 no way to put it.

12 What was the business of the ranch?

13 A. Charolais cattle, and Appaloosa horses.

14 Q. When you said he ran it, what kind of things did  
15 he -- as you know -- did he do in running that ranch?

16 A. Well, he managed it and took a, an active hand on  
17 participation, in the daily activity and operation of the  
18 ranch.

19 Q. Um, when did you first find out that your brother had  
20 been diagnosed with cancer?

21 A. It's been a couple years now. Gosh, and I found out  
22 through my Sister Jenny, Jeanette.

23 Q. And your family is -- You've indicated, is sort of  
24 split up. How do they normally communicate, phone, e-mail?

25 A. Telephone and e-mail.

26 Q. At the time that you found out, what was your  
27 response?

28 A. That, um, those cigarettes finally got him.

6119

1 Q. Now, does your family from time to time send e-mails  
2 back and forth?

3 A. Yes.

4 Q. Do you have e-mail in your computer?

5 A. I do.

6 Q. Would you from time to time get e-mails from your  
7 brother, Larry?

8 A. Yes.

9 Q. You get the e-mails from your other siblings?

10 A. Yes.

11 Q. Are these kinds of e-mails where you can send them  
12 out, they can be sent out to everybody, or just to  
13 individual siblings if you want to?

14 A. Both.

15 Q. And so you have a computer at your home that receives  
16 e-mail?

17 A. I do.

18 Q. Do you recall at any point your brother writing you  
19 e-mails, talking to you, to you individually about the  
20 hazards of smoking?

21 A. No.

22 Q. Did you ever write to your brother by e-mail, talking  
23 about the hazards?

24 A. No, I don't believe I did.

25 Q. Okay. Did you receive advance notification from your  
26 brother that he was going to file a lawsuit against certain  
27 tobacco companies?

28 A. No.

1 Q. Were you advised at some point that he had filed a  
2 lawsuit?

3 A. Yes.

4 Q. By e-mail?

5 A. You know, I don't recall.

6 Q. Um, would you sometimes get e-mails from your sister  
7 E'louise?

8 A. Yes.

9 Q. On health subjects?

10 A. I remember seeing probably sometime in the last  
11 couple years e-mail -- Articles from publications that she  
12 would e-mail to me.

13 Q. How about in smoking and health? Any articles from  
14 her on those subjects?

15 A. Probably within the last couple years, yes.

16 Q. And in these e-mails, were there e-mails from time to  
17 time which would talk about how Larry was progressing or not  
18 progressing in his condition?

19 A. In general, because he -- He had been diagnosed, he  
20 went through a series of medical treatments. He moved to  
21 Tempe for a period of time during some of those  
22 treatments -- And then moved back to -- Here to  
23 California, subsequent to the -- Those particular sets of  
24 treatment.

25 Q. Okay. So there was a point in time after he had been  
26 diagnosed with lung cancer where he moved to the Tempe area;  
27 is that correct?

28 A. Yes.

6121  
1 Q. And he started seeing a doctor in that area for  
2 treatment?

3 A. Yes.

4 Q. And then he stayed there for awhile, and then  
5 eventually he moved from there to Sacramento?

6 A. That's correct.

7 Q. So you and he were living in the same area at the  
8 time where some of the treatment was going on, correct?

9 A. He was about two blocks away from me at that time.

10 Q. And then, once he moved to the Sacramento area, did  
11 you learn at some time that he had had a -- They had found  
12 a brain -- Brain cancer?

13 A. We had received word, and I can't remember -- I  
14 can't remember exactly what the sequence of the line of  
15 communication was, but the event was that they -- Larry,  
16 his wife and his daughter, were driving home from a  
17 wedding -- I believe it was on a weekend evening, and Larry  
18 experienced a seizure.

19 His wife gained control of the car, stopped it, and  
20 he was having a seizure. She called a paramedic, and he was  
21 taken to, I believe, U.C. Davis Medical Center.

22 Q. And did you find out eventually that he had surgery  
23 for that cancer?

24 MR. GROSSMAN: Objection; relevance. Calls for  
25 hearsay.

26 THE COURT: Sustained.

27 Q. BY MR. PAUL: So did you find out how he was treated  
28 through these e-mails?  
6122

1 MR. GROSSMAN: Objection; same objection.

2 THE COURT: Sustained.

3 Q. BY MR. PAUL: Did you talk to your brother about  
4 having surgery for his brain?

5 A. Yes.

6 MR. GROSSMAN: Objection.

7 THE COURT: It's preliminary; overruled.

8 Q. BY MR. PAUL: Did there come a time when your  
9 computer was searched for e-mails?

10 A. Yes. Several months ago, a fellow came to the house,  
11 took a copy of my hard drive and left.

12 Q. And this was a fellow sent by the tobacco defendants  
13 in this case?

14 A. That's correct.

15 MR. GROSSMAN: Objection, your Honor.

16 It was a fellow called by the court order.

17 THE COURT: What's the objection? Do you have an  
18 objection?

19 MR. GROSSMAN: The objection was leading question.

20 And beyond the witness's knowledge.

21 THE COURT: Sustained.

22 Q. BY MR. PAUL: I didn't send him to your house, did I?

23 MR. GROSSMAN: Objection, your Honor.

24 THE COURT: Approach the bench, please.

25 (At Bench)

26 ---oo---

27 MR. GROSSMAN: Counsel is testifying.

28 THE COURT: What's the relevance of all this?

6123 1 MR. PAUL: Well, this all goes into this whole e-mail  
2 thing. They're claiming that my client was a liar and a  
3 prevaricator, and destroyed records. And I wanted to get  
4 into the fact what they've done; they searched his hard  
5 drive and got information.

6 THE COURT: Haven't you established that at that  
7 point?

8 MR. PAUL: Yeah. I want them to know that I didn't  
9 send them out. They're the ones who --

10 MR. GROSSMAN: You're the only one who can testify to

11 that; he can't.

12 MR. PAUL: He -- The --

13 THE COURT: Anyway, I'll just entertain the  
14 objections as they come -- Unless there's something beyond  
15 that, you haven't mentioned it.

16 Go ahead.

17 MR. PAUL: All right. Thank you, your Honor.

18 THE COURT: All right.

19 (Back In Open Court)

20 ---oo---

21 THE COURT: Proceed, Mr. Paul.

22 MR. PAUL: Thank you.

23 Q. Did you understand when this fellow came and took  
24 your computer and the hard drive, he was looking for  
25 e-mails?

26 A. That was my understanding.

27 Q. And it was e-mails between you and your family and  
28 your brother about his condition and what he felt and all  
6124  
1 the rest of it? Is that what you understood?

2 MR. GROSSMAN: Objection, your Honor. Misstates the  
3 record.

4 THE COURT: What's the elementary objection?

5 MR. GROSSMAN: It's leading and beyond the witness's  
6 expert -- Beyond the witness's ken. Beyond his  
7 understanding.

8 MR. PAUL: I'm asking him what his understanding is,  
9 so it can't be --

10 MR. GROSSMAN: And the basis of his understanding  
11 would be hearsay.

12 MS. FEY: Your Honor --

13 THE COURT: Sustained at this point, you can rephrase  
14 the question if you like.

15 Q. BY MR. PAUL: What did it feel like to have this  
16 fellow sit in your house and take the hard drive away?

17 MS. FEY: Objection, your Honor; relevance.

18 THE COURT: Sustained.

19 Q. BY MR. PAUL: Did you feel that was private  
20 information on your computer?

21 A. Yes --

22 MS. FEY: Same objection, your Honor.

23 THE COURT: Sustained. The answer is stricken.

24 Q. BY MR. PAUL: Did you put certain e-mails on there  
25 that you wanted to be seen?

26 A. Yes.

27 Q. What kinds of e-mails did you put on?

28 A. I scanned my hand in an obscene gesture and marked it  
6125 1 "tobacco".

2 Q. Anything else?

3 A. Um -- The message -- The message of the e-mail?

4 Q. Yeah.

5 A. Um, basically I indicated a -- Yeah. I did.

6 I -- As I said, basically, "If you find this, if you  
7 find this e-mail," then -- (Witness pausing)

8 Q. 'F-' you?

9 A. 'F-' you.

10 Q. Who was that directed at?

11 A. The people who I felt were taking the -- Taking  
12 information off my computer.

13 Q. Tobacco defendants?

14 A. That's correct.

15 Q. Now, did there come a time when you took a trip to  
16 Europe with your brother?

17 A. Yes, a couple years ago.

18 It will be two years this spring, I believe.

19 Q. Why did you go to Europe?

20 A. Um, basically to kind of say "good-bye" to the world.

21 Q. Was it an enjoyable trip?

22 A. There were mixed emotions. I enjoyed the trip. I  
23 enjoyed my brother's company. But it was very difficult to  
24 see him in the condition he was.

25 (Witness becoming emotional)

26 Q. What do you mean?

27 A. Um -- (pausing) --

28 THE COURT: Do you need a break?

6126 1 THE WITNESS: No. Just give me a minute.

2 Larry used to be a very robust man. And, um, he had  
3 a hard time just keeping up a normal walking pace. So  
4 basically he was very slow. And that was difficult for me  
5 to watch that.

6 Q. BY MR. PAUL: Did Larry go to Lourdes?

7 A. Yes. Lourdes. Lourdes, France. Yes.

8 Q. For those of us who may not know what Lourdes is,

9 it's a place where people go for what?

10 A. Um, for cure. It was a place -- It's a sacred place  
11 in the Catholic Church where there was a -- An apparition  
12 of the Blessed Virgin Mary, and the waters there are --  
13 That they have, some -- Curative, if that's the word --  
14 Curing properties.

15 Q. Was this trip before Larry's seizure? Or after?

16 A. I believe it was after.

17 Q. Had Larry ever told you that he now believes he is  
18 cured, after going to Lourdes?

19 A. No.

20 Q. Did Larry ever talk to you about his concern over his  
21 living or dying?

22 A. Yes.

23 Q. What has he said to you?

24 MR. GROSSMAN: Objection, your Honor. Hearsay.

25 THE COURT: What's the objection?

26 MR. PAUL: Frame of mind, your Honor.

27 THE COURT: Approach the bench. Approach the bench.

28 (At Bench)

6127

1 THE COURT: Why doesn't this fall within the

2 state-of-mind exception to the hearsay rule?

3 MR. GROSSMAN: It doesn't relate to the witness's  
4 state of mind.

5 MR. PAUL: No, no. It does.

6 THE COURT: The declarant's state of mind. The  
7 declarant would be the plaintiff.

8 MR. GROSSMAN: It's going for a self-serving  
9 statement on -- At no time -- No time has been given.  
10 It's not -- Counsel has not asked the witness whether this  
11 is referring to a time during which --

12 THE COURT: It may be uncertain as to time. I'll  
13 sustain the objection on that ground, but you're going to  
14 have to bring it within that exception.

15 MR. PAUL: I will. All right.

16 (Back In Open Court)

17 ---oo---

18 Q. BY MR. PAUL: Have you talked to Larry recently, and  
19 has he talked to you about his feelings or his state of mind  
20 regarding the subject of living and dying?

21 A. Yes.

22 Q. What has he said to you?

23 MR. GROSSMAN: May we approach your Honor.

24 THE COURT: All right.

25 (At Bench)

26 ---oo---

27 MR. GROSSMAN: As to recent statements, now that the  
28 litigation is underway, these are self-serving statements by  
6128  
1 Mr. Lucier with regard to a matter in the litigation, and  
2 this is a -- It doesn't meet the reliability necessities  
3 for the hearsay exception.

4 THE COURT: Well, there is a reliability component,  
5 but I think it's overcome here. This is clearly within the  
6 exception as phrased, and the fact that it's self-serving is  
7 not really germane under the circumstances; it doesn't  
8 relate to its reliability. I think there's sufficient basis  
9 for this, so I'll overrule the objection.

10 MR. PAUL: Thank you, your Honor.

11 (Back In Open Court)

12 ---oo---

13 Q. BY MR. PAUL: And what has he said to you?

14 A. He's talked about his concerns about his family.

15 Q. What has he expressed?

16 A. The -- One of the most difficult things for him --  
17 Is he won't be able to see his daughter grow up.

18 (Witness being emotional.)

19 Q. You've been able to observe Mr. Lucier the last few  
20 days, correct?

21 A. Yes.

22 Q. Just your own observations, how does he appear to  
23 you?

24 A. Like he's dying.

25 Q. How's his memory?

26 A. His short-term memory is not very good at all.

27 Q. What do you mean by that? What do you mean by that?

28 MR. GROSSMAN: Objection, your Honor.

1 May we approach?

2 THE COURT: We'll take a ten-minute recess. Please  
3 don't discuss the case.

4 (The jurors depart the courtroom at 10:18 pm.)

5 ---oo---

6 THE COURT: Okay. The jury is outside now, and the  
7 door is closed.

8 Mr. Grossman?

9 MR. GROSSMAN: Yes, your Honor. The plaintiffs are  
10 asking the witness for expert testimony -- In areas that  
11 doctors would normally give opinions on, as to the  
12 plaintiff's medical condition and his mental state.

13 If -- This is an area that would normally cover, be  
14 covered by medical testimony. If the plaintiffs want to  
15 offer medical testimony on it, they certainly can. But this  
16 is not appropriate for this witness's -- For this lay  
17 witness's testimony, particularly inasmuch as -- As medical  
18 testimony will be offered on some of these issues.

19 THE COURT: Mr. Paul?

20 MR. PAUL: Your Honor, I've asked him for his  
21 observations. He is a man who's known this person for 52  
22 years. He is permitted by law to give his observations of  
23 the condition of the plaintiff. All I've asked him is what  
24 his observations are about his memory.

25 THE COURT: Okay.

26 MR. PAUL: He said that he's got a short-term memory.  
27 He can give examples, so that was a predicate question or a  
28 foundational question: Give me an example of what you're  
6130  
1 talking about; he'll tell you that --

2 THE COURT: This is an inappropriate subject for lay  
3 testimony based on the question so far, and there appears to

4 be a sufficient foundation.

5 The objection is overruled.

6 MR. PAUL: Thank you, your Honor.

7 (The mid-morning recess was taken at 10:20 am.)

8 ---oo---

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6131

1 THE COURT: Okay. Bring the jury in, please.

2 (The following proceedings were then had in open court in  
3 the presence of the jury.)

4 THE COURT ATTENDANT: Please be seated and come to  
5 order.

6 THE COURT: All right. Mr. Paul.

7 MR. PAUL: Thank you very much, your Honor.

8 Q (By MR. PAUL) Mr. Lucier, we were talking at the break  
9 about -- you mentioned seeing changes in his short-term  
10 memory. Do you remember that?

11 A Yes.

12 Q Can you give the Court and the jury some examples of what  
13 you mean by that, what you have observed.

14 A Probably the two -- the two most pronounced examples that  
15 I recall: On our trip to Europe, Larry would want to go back  
16 to the hotel and rest during the midday and he'd want me to go  
17 with him. And I wasn't prepared to call it the end of the day,  
18 and he insisted that I go back with him. He -- I persisted in  
19 saying I didn't want to go, really wasn't ready to go back to  
20 the hotel, and he finally -- he finally admitted he couldn't  
21 remember the name of the hotel we were in or where it was. And  
22 so from that point forward generally we would take matchbooks  
23 from the hotel so that if he wanted to go back, he had the  
24 matchbook and he could tell the cab driver where to take him.

25 The other thing is just in the normal course of  
26 conversation, he'll relay a story and ten, fifteen minutes  
27 later he'll start relaying the same story. And I'd listen  
28 patiently and -- but he had a sense -- he's related to me that

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1 he had a sense that he does, you know, forget things and so  
2 he -- he indicates --

3 MR. GROSSMAN: Objection, your Honor.

4 THE COURT: The objection is what?

5 MR. GROSSMAN: Hearsay.

6 THE COURT: Sustained. Next question.

7 Q (By MR. PAUL) In your observations of Mr. Lucier, and I  
8 think you've already touched on it, you see a different level  
9 as far as his fatigue -- fatiguing than you used to see in him?

10 A Yes.

11 Q You sort of talked about in -- what you saw in -- in  
12 Europe. As you have been with him these last few days, have  
13 you seen the same thing?

14 A Yes.

15 Q Is Mr. Lucier a different person to you from the  
16 standpoint of memory and energy level than the person you knew  
17 before he was diagnosed with cancer?

18 A Substantially different.

19 MR. PAUL: Thank you. That's all I have, your Honor.

20 THE COURT: Mr. Grossman.

21 MR. GROSSMAN: Thank you, your Honor.

22 CROSS-EXAMINATION

23 BY THEODORE M. GROSSMAN, Attorney at Law, Counsel on behalf of  
24 the Defendant R.J. REYNOLDS TOBACCO COMPANY:

25 Q Mr. Lucier, I'm Ted Grossman. I represent R.J. Reynolds  
26 Tobacco in this case.

27 I'm just going to pull up this --

28 THE COURT: Aaron. Aaron.

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6133

1 Q (By MR. GROSSMAN) -- and ask you a few questions.

2 MR. GROSSMAN: Thanks a lot.

3 Good morning, everybody.

4 JURORS IN UNISON: Good morning.

5 Q (By MR. GROSSMAN) Mr. Lucier, hello again.

6 Your deposition was taken in this case about a year ago.

7 Do you recall that?

8 A I believe it was a little over a year ago.

9 Q Yeah. A year and a half ago?

10 A That's correct.

11 Q Now, before that -- that deposition you had met with one  
12 of your brother's lawyers by the name was Deborah Pole?

13 A That's correct.

14 Q You met with her for about three hours in preparation for

15 the deposition?  
16 A I don't recall the -- you know, the length of time to  
17 tell you the truth.  
18 Q Have you met with any of Mr. Lucier's lawyers before  
19 today?  
20 A Yes.  
21 Q When did you meet with them?  
22 A I saw them last night and then again this morning.  
23 Q With whom did you meet?  
24 A Uh, the two attorneys here and Bob Brown.  
25 Q Okay. Bob Brown was also the lawyer who contacted you  
26 about your computer; is that correct?  
27 A You know, I don't recall who contacted me about the  
28 computer.

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1 Q Do you recall whether it was Mr. Brown or perhaps your  
2 brother, Mr. Lucier, who contacted you about your computer?  
3 A I -- I just don't recall.  
4 Q You understood that the reason that your computer was  
5 requested was because your brother had destroyed his own  
6 computer after it had been subject to a court order.

7 MR. PAUL: Your Honor, I'm going to object. Calls for  
8 hearsay.

9 THE COURT: Sustain.  
10 MR. GROSSMAN: Your Honor, an admission is not hearsay.  
11 THE COURT: The form of the question. Sustained.

12 Q (By MR. GROSSMAN) Mr. Lucier, you understand that your  
13 brother destroyed his computer in April of this year?

14 A No.

15 Q Did your brother ever discuss with you why your computer  
16 was requested in this case?

17 A Uh, he had indicated that -- in the process of the  
18 lawsuit people were looking for certain information.

19 Q Did he ever tell you that he destroyed his computer?

20 A No.

21 Q This is the first time you're hearing about it?

22 A Well, the word "destroy," I know that he bought a new  
23 computer several months ago because the old one was  
24 purchased, in fact, I think when we were living together.

25 MR. GROSSMAN: Move to strike as nonresponsive, your  
26 Honor.

27 THE COURT: Stricken.

28 Q (By MR. GROSSMAN) Is this the first time that you've

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6135

1 heard that he destroyed his computer?  
2 MR. PAUL: I'm going to object to the form of the  
3 question. It's argumentative.  
4 THE COURT: Sustain as to form.  
5 Q (By MR. GROSSMAN) Did anyone ever tell you that Mr. --  
6 did Mr. Lucier or his wife ever tell you that he had junked his  
7 computer or destroyed it?

8 MR. PAUL: I'm going to object. It's compound and it's  
9 also argumentative.

10 THE COURT: Sustain as to form.

11 Q (By MR. GROSSMAN) Did Mr. Lucier ever tell you that he  
12 discarded his computer?

13 A Yes.

14 Q When did he tell you that?

15 A Uh, hmm. I'm just not -- I'm just not sure of the time

16 frame.  
17 Q Recently?  
18 A It was after he purchased a new computer.  
19 Q Sometime after he purchased a new one.  
20 A Correct.  
21 Q Mr. Lucier, you said you met with Bob Brown and with the  
22 two counsel here last night and this morning.  
23 A Correct.  
24 Q For about how long did you meet?  
25 A We had dinner last night and breakfast this morning.  
26 Q What subjects did you discuss?  
27 A Where the courtroom was, what it looked like, how it was  
28 laid out.

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1 Q Did counsel go over with you the areas that they might be  
2 inquiring into today?  
3 A Yes.  
4 Q Okay. So it wasn't just about the layout of the  
5 courtroom; is that correct?  
6 A No, I was trying to recall all the subject matter.  
7 Q And that's just as Miss Paul spent several hours  
8 discussing with you a year and a half ago the areas that might  
9 be inquired into?  
10 MR. PAUL: Your Honor, asked and answered. Also  
11 argumentative.  
12 THE COURT: Overruled.

13 THE WITNESS: I don't recall the time frame I spent with  
14 her. It was -- I know it was more than an hour and probably  
15 less than four hours.

16 Q (By MR. GROSSMAN) Okay. Now, you're close to Larry; is  
17 that right?

18 A Yes.  
19 Q You've lived with him three times in your adult life.  
20 A That's correct.  
21 Q In Tempe in 1970, in Berkeley in the early 1990s, and in  
22 Oakland in the mid-1990s; is that correct?  
23 A Correct.  
24 Q And you took a European trip with him as you said in  
25 April of 2001.  
26 A Yes.  
27 Q You discussed his medical condition or apparent health  
28 condition at that time. Were you aware that when he came home

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1 he was diagnosed as having had pneumonia during the trip?  
2 A Subsequent to the trip, I understand that he was  
3 diagnosed with pneumonia.  
4 Q And you -- you also took a trip with him this year,  
5 didn't you, in June of this year to North Carolina?  
6 A Yes. That's correct.  
7 Q So when you said that you hadn't seen him in a year, that  
8 wasn't exactly right.  
9 A I had forgotten.  
10 Q Yeah. Okay. And how long was that trip in North  
11 Carolina?  
12 A Approximately a week.  
13 Q Okay. And that was in June of this year; is that right?  
14 A That's correct.  
15 Q And as you said, you're close to your brother and you  
16 love him, right?

17 A That's correct.  
18 Q And you'd like to help him with this suit if you can,  
19 wouldn't you?  
20 A I'm here to help him and support him.  
21 Q Okay. Now, let's turn if we can to your growing up and  
22 your brother's growing up in Rochester and in Saint Louis, in  
23 Clayton, right?  
24 A Our residence was inside the city limits of Saint Louis  
25 city.  
26 Q Okay. As you said, you had a big home and Larry lived on  
27 the third floor, as you did; is that right?  
28 A That's correct.

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1 Q And there were a lot of kids.  
2 A Eleven total.  
3 Q Now, before too long after you moved into that house  
4 Larry had his own TV, is that right, up in his room on the  
5 third floor?  
6 A Say -- say it again.  
7 Q Before long after you moved into the new house in Saint  
8 Louis, Larry had his own TV up in his room on the third floor;  
9 is that correct?  
10 A That's correct.  
11 Q He had his own room there; is that correct?  
12 A That's correct.  
13 Q Did you have your own room too?  
14 A Yes, I did.  
15 Q And you were the two oldest boys in the family, right?  
16 A That's correct.  
17 Q Larry used to like to watch action shows, westerns and  
18 the like, didn't he?  
19 A My recollection is that we both watched westerns and  
20 action TV shows.  
21 Q He didn't really care for things like situation comedies.  
22 A I don't know if he didn't care for them. I think that  
23 his preference was western and action.  
24 Q Okay. You -- and you and he watched independently, but  
25 you both watched the TV news from time to time, didn't you?  
26 A On occasion.  
27 Q You also recall that the Saturday Evening Post and LIFE  
28 magazines were around the house in Rochester?

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1 A Yes.  
2 Q And TIME and Newsweek started coming in addition to those  
3 when you moved to Saint Louis?  
4 A I don't recall the Saturday Evening Post in Saint Louis,  
5 but the other three publications I recall in Saint Louis.  
6 Q And your family subscribed to the Rochester -- to both  
7 Rochester newspapers, The Times Union and the Democratic  
8 Chronicle; is that right?  
9 A I believe so.  
10 Q And you and your brother were both paperboys for those  
11 papers.  
12 A I was, and I don't know whether he was old enough at the  
13 time to have a paper route in Rochester. I don't recall.  
14 Q Okay. When you moved to Saint Louis, Larry was ten or  
15 eleven years old?  
16 A Yes.  
17 Q And after that your family subscribed to the Saint Louis

18 Post Dispatch; is that correct?  
19 A Yes.  
20 Q Now, you've told the jury that both of your parents  
21 smoked.  
22 A That's correct.  
23 Q Your father smoked up to three packs of cigarettes a day.  
24 A That's my recollection.  
25 Q And your mother -- it's your mother who smoked Kent; is  
26 that right?  
27 A I believe so.  
28 Q And your father was a busy executive, correct?

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1 A Yes.  
2 Q A successful telecommunications executive.  
3 A Correct.  
4 Q And your mother with 11 children stayed home; is that  
5 right?  
6 A Mostly, yes.  
7 Q Okay. To the extent that the cigarettes were available  
8 for stealing, hers were far more available, correct?  
9 A No. They weren't more available. They were equally  
10 available, as were my dad's.  
11 Q Yeah. Well, she was home much more of the time.  
12 A They bought cigarettes by the carton and we knew where  
13 they kept them.  
14 Q Okay. As far as open packs were concerned, her open pack  
15 was around much more of the time; is that correct?  
16 A No. My dad left open packs of cigarettes all over the  
17 house.  
18 Q Now, you told the jury that you had your first cigarette  
19 when you were very young.  
20 A Yes.  
21 Q And that was from an open pack of one of your parent's  
22 cigarettes?  
23 A As I recall, yes.  
24 Q And you don't recall exactly which brand it was at the  
25 time; is that right? You don't recall which parent's cigarette  
26 it was?  
27 A I remember smoking Kent.  
28 Q And the reason you took that first cigarette is that you

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1 were curious; is that right?  
2 A Uh, I think there were several factors, one of which was  
3 I was curious.  
4 Q And you shared it with a friend as you recall; is that  
5 right?  
6 A I remember an occasion where we -- we, my friend and  
7 myself, took a couple of cigarettes and went out and smoked  
8 them.  
9 Q Now, you hid this from your parents.  
10 A Yes.  
11 Q And you hid it from your parents because you knew that,  
12 to say the least, they wouldn't approve.  
13 A That's correct.  
14 Q You never had a cigarette in front of your parents until  
15 you returned from the army; is that right?  
16 A Yes.  
17 Q And that's because you knew that until then your parents  
18 wouldn't approve of your having a cigarette.

19 A Yes.  
20 Q Now, you started smoking on a regular basis when you were  
21 14 or 15 years old; isn't that right?  
22 A Yes.  
23 Q And it's your recollection that -- well, I'll come to  
24 that in a moment.  
25 The cigarettes that you started smoking regularly were  
26 Winston's.  
27 A Yes.  
28 Q In the soft pack.

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1 A Yes.  
2 Q You told us.  
3 And you stayed with Winston's the rest of your smoking  
4 career, so to speak.  
5 A Yes.  
6 Q You'd occasionally borrow a cigarette from someone else  
7 that might be a different brand.  
8 A Yes.  
9 Q But you liked your Winston's more.  
10 A Yes.  
11 Q And because you liked them more, that's what you stayed  
12 with.  
13 A I took what I felt were extraordinary measures to ensure  
14 the fact that I had access to Winston cigarettes.  
15 Q You really liked them more than the others.  
16 A I did.  
17 Q And if you liked another one more, you would have  
18 switched to them, but you didn't like another one more.  
19 A I stuck with Winston because I liked them.  
20 Q Now, you talked about the Christian Brothers High  
21 School. Larry attended Christian Brothers the year after you  
22 graduated?  
23 A I believe so.  
24 Q And smoking wasn't permitted there, right?  
25 A Correct.  
26 Q In fact, there was a handbook given out to all students  
27 that specifically spoke about smoking, didn't it?  
28 A There was -- there was a rule book, and -- and it

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1 indicated that smoking was not allowed on campus or while --  
2 while in uniform.  
3 Q And you would get several demerits if you were found to  
4 have smoked?  
5 A Yes.  
6 Q Talking about Larry for a moment, when he was growing up  
7 he had some disciplinary problems, didn't he?  
8 A Uh, disciplinary problems? He had a temper.  
9 Q Well, he always had a temper, didn't he?  
10 A He was a pretty headstrong kid.  
11 Q He -- he -- first of all, Larry is an intelligent man,  
12 isn't he?  
13 A He's a smart fellow.  
14 Q And he's always been pretty headstrong.  
15 A I would characterize him as always being headstrong.  
16 Q When he made up his mind about something he pretty well  
17 stuck to it, didn't he?  
18 A Yes.  
19 Q And you've characterized him as pretty stubborn too; is

20 that right?

21 A Yes.

22 Q Now, Mr. Lucier, as to the disciplinary problems, your  
23 parents -- you recall there were some instances of disciplinary  
24 problems coming from fighting; is that right?

25 A There was only one that I recall and it involved him  
26 defending somebody against a bully.

27 Q That -- well, there were disciplinary problems of a  
28 number of sorts that arose with Larry, weren't there, and your  
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1 parents as concerned parents had a less than positive reaction  
2 to that?

3 A I think that's a fair assessment.

4 Q Now, you said that you became a regular smoker when you  
5 were 15 or 16.

6 A Yes.

7 Q And you're two years older than Larry.

8 A Yes.

9 Q And it's your recollection that Larry became a regular  
10 smoker around the same time you did.

11 A He may have been a little bit earlier than me, but it  
12 was -- it was within a couple of year period.

13 Q Well, the first time that you recall him smoking was when  
14 you were 15 or 16 years old; is that correct?

15 A It may have been a year or two earlier, but somewhere  
16 between my early -- my early teen years, 13, maybe 15, along  
17 through there.

18 Q I'm going to play you a -- your deposition from a year  
19 and a half ago. This is page 47, line 23 through page 48, line  
20 4.

21 Melanie, could you play that, please.

22 MR. PAUL: May I just have a second?

23 MR. GROSSMAN: Sure.

24 (Pause.)

25 MR. PAUL: Could you read it all the way through line 9?

26 MR. GROSSMAN: I'm happy to.

27 MR. PAUL: Okay. No objection.

28 THE COURT: Okay.

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1 (The following videotape excerpt was played and  
2 reported.)

3 Q Do you recall at any time -- the first time you recall  
4 him smoking?

5 A I was in high school. I was probably 15 or 16, in that  
6 time range. And we were probably playing -- I used to play  
7 cards with some friends up in my room and there were occasions  
8 when he would be there and he would be smoking.

9 Q And that's the first time you can recall him smoking?

10 A That's the -- that's the first time that I recall that he  
11 was a regular smoker, but I don't know when he took his first  
12 cigarette.

13 (Videotape excerpt concluded.)

14 Q (By MR. GROSSMAN) So, Mr. Lucier, it's fair to say you  
15 don't know when your brother took his first cigarette, but you  
16 don't recall him being a regular smoker until he was 13 or 14  
17 years old.

18 A That's correct.

19 Q And let me find my place.

20 And you don't know how many cigarettes your brother

21 smoked a day during that period, is that correct, in his teens?

22 A No, I don't.

23 Q Now, you were smoking Winstons, right?

24 A Yes.

25 Q And on occasion you would give your brother a cigarette  
26 which would be a Winston, right?

27 A Yes.

28 Q To your knowledge, Winston was never your brother's

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1 regular brand of cigarettes; isn't that right?

2 A I don't -- I don't recall if that was or wasn't his  
3 regular brand at any time.

4 Q As we sit here today, you don't recall Larry ever smoking  
5 a Winston except when you gave him one; is that correct?

6 A You're asking me to remember things 40 years ago. I just  
7 don't recall.

8 Q Okay. Now, you were the older brother and you  
9 occasionally gave your brother the cigarettes.

10 A That's correct.

11 Q Do you feel at all responsible for his smoking?

12 MR. PAUL: Objection; argumentative.

13 THE COURT: Overruled.

14 MR. PAUL: Irrelevant.

15 THE COURT: Sustained.

16 Q (By MR. GROSSMAN) Do you feel that you had anything to  
17 do with your brother smoking?

18 MR. PAUL: Objection; irrelevant.

19 THE COURT: Overruled.

20 MR. PAUL: Calls for speculation.

21 THE COURT: Overruled.

22 THE WITNESS: Could you repeat the question?

23 Q (By MR. GROSSMAN) Do you think that you had anything to  
24 do with your brother's smoking?

25 A I gave him some cigarettes.

26 Q Do you think that you were a role model for him as an  
27 older brother?

28 A I think he looked up to me to a certain extent, yes.

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1 Q Do you think that had anything to do with his smoking?

2 A I don't know.

3 Q Let's talk about awareness of cigarette risks in your  
4 household.

5 A Mm-hmm.

6 Q You recall hearing the term "cancer sticks" from when you  
7 were a very young boy; is that right?

8 A Yes.

9 Q And you also recall hearing the term "coffin nails,"  
10 referring to cigarettes from when you were a very young boy.

11 A Yes.

12 Q And you remember in 1964 when the Surgeon General's  
13 Report on Smoking and Health came out.

14 A I recall it was the mid-sixties and -- and a report had  
15 been -- had come forth from the Surgeon General.

16 Q And you'd heard about it on media coverage.

17 A Yes.

18 Q And it's your understanding that your brother saw the  
19 same media coverage about the Surgeon General's Report that you  
20 did.

21 A I assume he did. We watched the same TV programs

22 approximately the same time. We were living within, you know,  
23 the house pretty much the same time. Although, in the -- at  
24 that particular time he may have been away at school. '64.  
25 No, he would have been back. No, wait a minute. He was --  
26 let's see. He may have been away at school at that time.  
27 Q Does it refresh your recollection that your brother was  
28 away at school from September 1965 through April 1966?

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1 A I don't know the exact dates. I know that it was -- he  
2 spent the first couple years in high school away, and he was a  
3 couple years behind me, so that would have been -- that would  
4 have put it about that time frame.

5 Q Okay. Well, in any event, the Surgeon General's Report  
6 came out in January 1964. And that doesn't conflict with your  
7 memory; is that correct?

8 A Again, it was mid-sixties and -- and if it was January  
9 1964, then so be it.

10 Q Yeah. Okay.

11 Now, you recall that there was a discussion at your  
12 dinner table about the Surgeon General's Report and the media  
13 covering -- surrounding it; isn't that right?

14 A I -- yes. I do recall there were some discussions around  
15 our table.

16 Q And some of those discussions may have been initiated by  
17 your parents but others by your brothers and sisters who were  
18 old enough to watch the news and talk about the issues and  
19 discuss them.

20 A I don't recall who initiated the conversation. I do  
21 remember that sometimes it was hard to get a word in edgewise.

22 Q And the Surgeon General's Report was one of the hot  
23 topics of the day, wasn't it?

24 A It was.

25 Q Now, you mentioned your sisters -- your sister Elouis'  
26 warnings that she gave you about the risks of smoking.

27 A Yes.

28 Q I'd like to go into them in a little more detail.

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1 You said that you stopped smoking about 13, 14 years ago  
2 when you were 40 years old.

3 A It was in the spring of 1988.

4 Q And you -- you decided to quit because you believed that  
5 if you kept on smoking the cigarettes would kill you.

6 A Yes.

7 Q You came to that belief beginning with the Surgeon  
8 General's Report and all the media attention that was brought  
9 to it and for other -- for additional reasons that you learned  
10 over the years; is that right?

11 A It had mostly to do with the over the years as opposed to  
12 a specific starting point. And -- and I'm not -- you know, I  
13 don't know if I gave it any serious consideration in January of  
14 1964, but as I grew older and -- and listened to more and heard  
15 more, I had pretty well decided if I did not quit it was going  
16 to kill me.

17 Q Well, you've said that your knowledge began with the  
18 Surgeon General's Report; is that correct?

19 A That was the first I heard.

20 Q First of specific reports of specific diseases?

21 A Yes.

22 Q Apart from hearing about "cancer sticks"?

23 A Correct.  
24 Q Now, your sister Elouis knew you were smoking in high  
25 school.  
26 A Yes.  
27 Q And she tried to get you to quit then; is that right?  
28 A That's correct.

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6150

1 Q She told you it was unhealthy; isn't that right?  
2 A Yes.  
3 Q And she told you this often, didn't she?  
4 A On several occasions.  
5 Q In fact, it started at about the time the Surgeon  
6 General's Report was coming out, is that correct, that she  
7 started telling you these things?  
8 A It may have been a little bit earlier than that when she  
9 first saw me smoking and thought it wasn't just a great idea.  
10 Q Because of health reasons?  
11 A I -- I think it was because she thought it would have an  
12 ill effect on my health.  
13 Q And the Surgeon General's Report was one of the things  
14 and part of the ammunition that your sister Elouis used when  
15 she discussed smoking with you; isn't that right?  
16 A Subsequent to it coming out, yes.  
17 Q She also discussed several studies that had been made  
18 public about the risks of smoking in addition to the Surgeon  
19 General's Report.  
20 A She had referenced some reports, but I didn't -- I didn't  
21 correlate whether they were part of the Surgeon General's or  
22 apart from it.  
23 Q Okay. That's fine.  
24 A But -- yeah.  
25 Q She would tell you -- and this is in the sixties,  
26 mid-sixties -- that there was a strong correlation between  
27 cigarette smoking and emphysema, heart disease and lung cancer;  
28 is that right?

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6151

1 A Yes.  
2 Q And she raised those whenever the subject of smoking came  
3 up.  
4 A Well, after 1966, I'd left the house, and she was away at  
5 school and so we didn't see each other very often but a couple  
6 of times during the year. And particularly when I came home  
7 from the army in 1967 and I smoked openly, she had made some --  
8 she had made some comments about -- about smoking and the  
9 health hazards.  
10 Q And what she told you was that it was a bad thing to do  
11 and if you didn't quit it would kill you.  
12 A I don't recall her telling me it would kill me. I recall  
13 that she told me it was bad for my health and -- and she went  
14 through several examples of the health consequences.  
15 Q Well, even before 1966, before you left your home, do you  
16 recall that she told you it would kill you?  
17 A Again, not specifically. But given the time frame and --  
18 and my behavior patterns at the time and where she was kind of  
19 coming from, yeah.  
20 Q Yeah. If we could, just to refresh your recollection,  
21 page 41, lines 15 to 22.  
22 (Unreported discussion was had between Counsel.)  
23 Q (By MR. GROSSMAN) Mr. Lucier, so it is your testimony

24 that before 1966 your sister Elouis told you that smoking was a  
25 bad thing to do and that if you didn't quit it would probably  
26 kill you?

27 A Yes.

28 Q Now, in the years before 1988, you referred to this in  
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6152

1 your direct testimony, there were indeed times when you and  
2 your brother Larry were together with your sister Elouis and  
3 she told both of you together to quit smoking; isn't that  
4 right?

5 A The only specific example as I can recall -- it may not  
6 have been specific. Hmm. I'm having a hard time recollecting  
7 right now.

8 Q All right. Well, let's put on page 77, lines 14 through  
9 page 78, line 6. After Mr. Paul has an opportunity to review.

10 MR. PAUL: I'm sorry. 77?

11 MR. GROSSMAN: 77, line 14 to page 78 line 6.

12 (Pause.)

13 MR. PAUL: I have no objection.

14 THE COURT: Okay.

15 MELANIE ROBERTS: I'm sorry. Did you say line 6?

16 MR. GROSSMAN: Yes.

17 (The following videotape excerpt was played and  
18 reported.)

19 Q So sometime between 1966 and 1988, there were a couple of  
20 occasions where she told both you and your brother at the same  
21 time to quit smoking?

22 A That's correct.

23 Q And do you recall on those occasions exactly what she  
24 said?

25 A No.

26 Q On those occasions, did she say anything about a  
27 connection between smoking and different diseases?

28 A My recollection is that she made the -- she made the

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1 correlation between smoking and -- and various diseases.

2 Q Were those the same diseases you mentioned before, I  
3 think, emphysema, heart disease and lung cancer?

4 A Correct.

5 (Videotape excerpt concluded.)

6 Q (By MR. GROSSMAN) And that refreshes your recollection?

7 A It does. Thank you.

8 Q Now, Mr. Lucier, going back to the mid-1960s to late  
9 1960s, do you recall when warnings came out on packages of  
10 cigarettes?

11 A Yes.

12 Q Your sister Elouis' warnings were a lot stronger in -- to  
13 your mind than the warnings on the cigarettes, weren't they?

14 A Yes.

15 Q And she -- she gave you warnings that couldn't be put on  
16 any cigarettes; is that correct?

17 A I think that's a way I stated it as a matter of fact.

18 Q Yeah.

19 A Yeah.

20 Q In words that would not be printed on a label?

21 A Yeah, yeah.

22 Q And going back to the mid to late 1966 -- 1960s, during  
23 that period of time, from your perspective that wasn't any  
24 debate about the health risks of smoking; isn't that right?

25 A As I recall, that was the debate. Between the Surgeon  
26 General and the tobacco industry in general.

27 Q From your perspective there was no controversy, you  
28 thought that the health risks -- that smoking had health risks

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6154

1 involved.

2 A Hmm. Could you repeat the question, please?

3 Q Yes. Going back to the mid to late 1960s, during that  
4 particular period of time, from your perspective there was no  
5 longer a debate or controversy regarding the health risks of  
6 smoking; isn't that right?

7 A Well, that to me was the controversy, as I recall. I  
8 mean, that was -- the cigarette warning labels came out. There  
9 was -- and there was controversy about the -- about the  
10 reports.

11 Q From your perspective there was no controversy?

12 A Well, right now I'm recollecting that that was the  
13 controversy.

14 MR. GROSSMAN: Okay. Mr. Paul, page 158, lines 3  
15 through 15.

16 MR. PAUL: No objection.

17 (The following videotape excerpt was played and  
18 reported.)

19 A There were health risks associated with smoking.

20 Q During this time, do you recall whether --

21 MR. GROSSMAN: No. That's lines 3 through 15.

22 MELANIE ROBERTS: Sorry about that. Sorry.

23 (The following videotape excerpt was played and  
24 reported.)

25 Q Going back to the mid to late sixties when you recall  
26 that there were -- there was a warning or warnings on packs of  
27 cigarettes and when you testified to Mr. Geise that Elouis' --  
28 your sister's message was stronger than the warnings on the

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6155

1 package of cigarettes, do you recall that, during this  
2 particular time period, was there still a debate or controversy  
3 regarding the health risk of cigarettes?

4 A Um, from perspective, no.

5 Q Okay. And why was that?

6 A I thought there were health risks associated with smoking.

7 Q Okay.

8 (Videotape excerpt concluded.)

9 Q (By MR. GROSSMAN) Okay. Now, Mr. Lucier, you've told  
10 the jury that your father smoked.

11 A Yes.

12 Q And that he smoked up to three packs of cigarettes a day.

13 A Yes.

14 Q And your father tried to quit smoking on one instance; is  
15 that correct?

16 A I remember when he did quit smoking.

17 Q And you don't recall him ever trying before that; is that  
18 right?

19 A I -- I haven't -- no.

20 Q That's right?

21 A That is correct. I have no recollection of him trying to  
22 quit smoking prior to the fact -- prior to the time that he did  
23 quit smoking.

24 Q He died in 1970?

25 A He was murdered in 1970.

26 Q A car bomb?  
27 A Yes.  
28 Q And he had stopped smoking not that long before; is that  
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1 correct? Late 1960s?  
2 A Um, only several months. I think it was even less than a  
3 year perhaps.  
4 Q Your brother was aware of the fact that your father had  
5 stopped smoking.  
6 A I think he was.  
7 Q At your father's funeral after he was murdered, the  
8 subject came up of how ironic it was that he had just quit  
9 smoking to improve his health and avoid the possibility of  
10 dying from lung cancer or other diseases and then was killed.  
11 A Correct.  
12 Q And that's a conversation that you had with Larry as well  
13 as others of your brothers and sisters.  
14 A Yes.  
15 Q Now, in 1988 you stopped smoking.  
16 A Yes.  
17 Q And that was the very first time that you tried to quit.  
18 A Yes.  
19 Q And you told Larry you stopped smoking.  
20 A Pardon me?  
21 Q You told Larry that you had stopped smoking?  
22 A Yes, at some point subsequent to that I had indicated  
23 that I quit smoking.  
24 Q And you told Larry that you had used a hypnotist.  
25 A Yes.  
26 Q And you encouraged him to quit and to use your hypnotist.  
27 A Yes.  
28 Q You told him you'd be happy to give him the name of the  
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1 hypnotist if he were interested in trying to quit.  
2 A Yes.  
3 Q And for whatever reason he turned you down and never  
4 contacted the hypnotist; is that correct?  
5 A As far as I know.  
6 Q As far as you know he --  
7 A He didn't contact them.  
8 Q -- he didn't contact them.  
9 And when you stopped smoking in 1988 or soon thereafter  
10 when you spoke with Larry, you told him why you quit smoking.  
11 A Mm-hmm.  
12 Q And I know you use raw language among your family, but  
13 what you told him on that and many other times was in exactly  
14 these words, "The shit will kill you." Is that right?  
15 A Yes.  
16 Q It became almost a mantra, didn't it?  
17 A For me, yes, it did.  
18 Q And his response was, "Maybe it will and maybe it won't."  
19 A That's my recollection.  
20 Q Now, your brother moved in with you in Berkeley in the  
21 early 1990s.  
22 A Yes.  
23 Q And you lived together for a period of months.  
24 A Yes.  
25 Q And over that period of time you repeated the mantra  
26 several times, "The shit will kill you."

27 A Yes.

28 Q And he should shrugged it off.

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1 A Yes.

2 Q In Berkeley there was a main house and then there was a  
3 small back house.

4 A Correct.

5 Q And you told him that there would be no smoking in the  
6 main house; is that right?

7 A Yes.

8 Q And he had abided by that restriction.

9 A Yes, he did.

10 Q The restriction was your personal choice.

11 A Well -- and it was my sister Jenny's house and she had  
12 indicated she didn't want smoking in the house either. But,  
13 yes, it was my personal preference as well.

14 Q And he complained about it, didn't he?

15 A Yes.

16 Q In your words, he called your manhood into question?

17 A Yes.

18 Q But he didn't prevail.

19 A No, he did not.

20 Q Knowing that you were a former smoker, he still wanted to  
21 smoke around you.

22 A I don't know that that was his motivation.

23 Q Whether it was his motivation or not, knowing you were a  
24 former smoker, he had no compunctions about smoking around you.

25 A Uh, he knew -- he knew -- he knew that I -- I didn't  
26 approve.

27 Q Yeah.

28 A And I didn't like being around it.

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1 Q Yeah. But he continued to smoke around you or ask -- or  
2 said he wanted to smoke in the main house.

3 A He had indicated that, you know, he shouldn't be  
4 restricted.

5 Q Now, later you lived together in Oakland in the early to  
6 mid-90s.

7 A Mm-hmm.

8 Q And that was in an apartment.

9 A Yes.

10 Q And you told him that he couldn't smoke in the apartment.

11 A That's correct.

12 Q And he abided by that.

13 A Yes.

14 Q As we sit here today, you can't recall any time when your  
15 brother ever said that he wanted to quit smoking; is that  
16 correct?

17 A He'd indicated that he wanted to quit a couple of times.  
18 There was a time when he wore a patch and he chewed Nicorette  
19 gum in an attempt to quit.

20 Q Well, at least as of a year and a half ago you couldn't  
21 recall your brother ever saying that he was going to quit  
22 smoking; is that right?

23 A I don't recall the words, "I want to quit smoking." I  
24 recall that he wore a patch and -- and -- and talked about how  
25 he seemed to be making progress towards quitting, but I don't  
26 think he ever used the words -- I don't recall him using the  
27 words, "I want to quit smoking."

28 Q Well, in fact, you never had -- he wore a patch, but you  
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1 never had a discussion with him about why he was using the  
2 patch; is that correct?

3 A I guess I made the assumption that if he was wearing the  
4 patch he was trying to quit.

5 Q It was your assumption.

6 A It was my assumption. He never -- I don't recall him  
7 saying the words, "I want to quit smoking."

8 Q Do you know whether he was wearing the patch to -- to  
9 avoid -- when he wore the patch he continued to smoke at times;  
10 is that correct?

11 A Yes.

12 Q And do you know if he was wearing the patch to go through  
13 times when he wasn't allowed to smoke in your apartment rather  
14 than an effort to quit?

15 A I believe he was wearing a patch at that time. He was  
16 also -- there was another -- there was another period of time,  
17 it could be fairly close to the same -- to that period, when he  
18 chewed the Nicorette gum.

19 Q Same thing though?

20 A Yes.

21 Q Now --

22 THE COURT: We're going to take a short break. Just five  
23 minutes.

24 Please don't discuss the case among yourselves or with  
25 anyone else. Remember, you must not converse with the lawyers,  
26 the witnesses, or anyone associated with this case at all,  
27 period, during these recesses.

28 Five minutes only.

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1 (Recess.)

2 THE COURT: Okay. Bring the jury in, please.

3 THE COURT ATTENDANT: Please be seated and come to  
4 order. Court is again in session.

5 THE COURT: Okay. Mr. Grossman.

6 MR. GROSSMAN: Thank you, your Honor.

7 Q (By MR. GROSSMAN) Mr. Lucier, you spoke earlier about  
8 stealing your parents' cigarettes.

9 MR. PAUL: That misstates his testimony. Objection.

10 THE COURT: Sustain as to form.

11 Q (By MR. GROSSMAN) Mr. Lucier, you spoke earlier about  
12 taking your parents' cigarettes.

13 A Yes.

14 Q And you weren't borrowing them, right?

15 A I had no intention of putting them back.

16 Q Yeah. Okay.

17 And kids, teenagers being as they are, those weren't the  
18 only authorized things that you took from your parents.

19 A Uh, I don't understand the question.

20 Q Sometimes you got into their liquor cabinet as well.

21 MR. PAUL: Your Honor, I'm going to object. This is  
22 beyond the direct. It's irrelevant and immaterial.

23 THE COURT: Sustained, sustained.

24 Q (By MR. GROSSMAN) Mr. Lucier, I'll ask you about a  
25 couple of organizations and companies. You've never heard  
26 about the Council for Tobacco Research; is that correct?

27 A That's correct. With the exception of at my deposition a  
28 year and a half ago --

1 Q When you were asked about it.  
2 A -- it was brought up. And I didn't know then and I don't  
3 know what they do now.  
4 Q Okay. With the exception of your deposition, you have no  
5 knowledge of Larry ever seeing or hearing any statement from  
6 the Council for Tobacco Research; is that correct?  
7 A Not to my knowledge.  
8 Q Now, you've never heard of the Tobacco Industry Research  
9 Committee; isn't that right?  
10 A That's correct.  
11 Q And you have no knowledge of Larry ever taking any action  
12 on the basis of any statement or publication of the Tobacco  
13 Industry Research Committee; isn't that right?  
14 A That's correct.  
15 Q Apart from your deposition a year and a half ago, you  
16 never heard of the Tobacco Institute.  
17 A That's correct.  
18 Q And to your knowledge, Larry never heard of the Tobacco  
19 Institute.  
20 A That's correct.  
21 Q He never mentioned it to you.  
22 A No.  
23 Q And he never said he took any action based on anything  
24 they said.  
25 A That's correct.  
26 Q In your life you've never heard -- you've never had any  
27 discussion with Larry about any statement or publication from  
28 R.J. Reynolds.

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1 A No.  
2 Q That's correct?  
3 A That's correct.  
4 Q And you have no knowledge of Larry ever taking any action  
5 on the basis of any statement or publication by R.J. Reynolds;  
6 isn't that right?  
7 A That's correct.  
8 Q The same is true for Philip Morris, isn't it?  
9 A That's correct.  
10 Q You've never had any discussion with Larry about Philip  
11 Morris; isn't that right?  
12 A That's correct.  
13 MR. GROSSMAN: Mr. Lucier, very nice meeting you.  
14 I have no further questions.  
15 THE WITNESS: Thank you.  
16 THE COURT: Miss Fey.  
17 MS. FEY: Yes, your Honor. Thank you.  
18 CROSS-EXAMINATION  
19 BY LAURA C. FEY, Attorney at Law, Counsel on behalf of the  
20 Defendant PHILIP MORRIS INCORPORATED:  
21 Q Good morning.  
22 Good morning, Mr. Lucier.  
23 A Good morning.  
24 Q My name is Laura Fey and I represent Philip Morris  
25 Incorporated, and I've just got a few questions for you this  
26 morning. It shouldn't take very long.  
27 A Sure.  
28 Q You testified this morning about the closeness between

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1 you and your brother Larry.

2 A Yes.

3 Q But you and your brother Larry never discussed why he  
4 started smoking, did you?

5 A No, we did not.

6 Q Your brother Larry never told you that he selected any  
7 brand of cigarettes because of any advertisement, did he?

8 A He never said that to me.

9 Q And your brother Larry never told you that he selected  
10 any brand of cigarettes because of any statement from a tobacco  
11 company, did he?

12 A That's correct.

13 Q And as you said in response to Mr. Grossman's questions,  
14 you and your brother had never had a discussion about Philip  
15 Morris or any statement by Philip Morris; isn't that correct?

16 A That's correct.

17 Q He's never told you that he smoked cigarettes because of  
18 anything Philip Morris did, has he?

19 A He never told me anything like that.

20 Q You testified today that your brother smoked Merit filter  
21 cigarettes; is that correct?

22 A Yes.

23 Q But he never told you why he smoked filtered cigarettes,  
24 did he?

25 A He never told me his motivation.

26 Q He never told you that he was interested in smoking a  
27 filtered cigarette because it was low in tar or low in  
28 nicotine, did he?

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1 A He never told me his motivation.

2 Q You testified today that when Larry smoked he often tore  
3 the filters off of his filtered cigarettes.

4 A That's correct.

5 Q But he never told you why he tore the filters off, did  
6 he?

7 A No, he did not.

8 Q But it was very routine for your brother to do this,  
9 wasn't it?

10 A Yes, it was.

11 Q In fact, you recall him doing that every time he smoked a  
12 filtered cigarette, don't you?

13 A Yes, I do.

14 Q You don't recall your brother Larry ever trying to quit  
15 before the early 1990s, do you?

16 A No, I don't. I don't recall.

17 Q And as you said this morning, you don't recall him ever  
18 saying that he wanted to quit smoking either, did you -- do you?

19 A I don't recall that statement either.

20 MS. FEY: Thank you, Mr. Lucier.

21 I have no further questions.

22 THE COURT: Mr. Paul.

23 REDIRECT EXAMINATION

24 BY GARY M. PAUL, Attorney at Law, Counsel on behalf of the  
25 Plaintiffs:

26 Q Mr. Lucier, I'll touch on a couple things that were  
27 brought up by Mr. Grossman.

28 Your sister Jenny's house, you and your brother Larry

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1 stayed there with her at some point in time?  
2 A She had already moved back to Tempe when we lived in that  
3 house together.  
4 Q Okay.  
5 A When Larry and I lived in the house together.  
6 Q Okay. And as I understand it, there was a main house and  
7 an in-back house; is that correct?  
8 A That's correct.  
9 Q And it was your sister's rule, and a rule that you agreed  
10 with, that there shouldn't be smoking in the main house,  
11 correct?  
12 A That's correct.  
13 Q Did that mean Larry didn't smoke anymore?  
14 A No, it didn't.  
15 Q Where did he have to go to smoke?  
16 A Outside of the main house.  
17 Q Okay. So if he wanted a cigarette, since he wasn't  
18 allowed to smoke in the main house, he had to go outside to do  
19 it, correct?  
20 MR. GROSSMAN: Objection, your Honor, leading.  
21 THE COURT: Overruled.  
22 Q (By MR. PAUL) Is that what you're saying?  
23 A Yes. He had to be outside of the house.  
24 Q Okay. Did he still go outside and smoke?  
25 A Yes.  
26 Q Now, when he lived with you in the apartment, I think in  
27 Berkeley -- is that what you said?  
28 A Oakland.

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1 Q Oakland. You had a rule there that he couldn't smoke in  
2 the apartment, correct?  
3 A That's correct.  
4 Q So did he stop smoking then?  
5 A No.  
6 Q Where did he smoke?  
7 A He smoked on the balcony and outside the building. And I  
8 think he even smoked inside his bedroom with the window propped  
9 open.  
10 Q All right. So in other words -- just so I'm following  
11 you, if he couldn't smoke in the apartment and maybe in his own  
12 bedroom with the window open he would go out on the balcony to  
13 smoke or he would go outside the building to smoke, correct?  
14 A That's correct.  
15 Q How long did he live with you in Oakland?  
16 A Gosh, a year, year and a half, I think. That time frame.  
17 Q So -- okay. So whether it was summer or winter or  
18 raining, if he wanted to smoke he had to do it either --  
19 MR. GROSSMAN: Counsel is testifying, your Honor.  
20 THE COURT: Sustain as to form.  
21 Q (By MR. PAUL) I mean, they have all kinds of weather in  
22 Oakland, don't they?  
23 A Yes.  
24 Q Does it rain there sometimes?  
25 A Yes.  
26 Q Does it get a little chilly there sometimes?  
27 A Yes.  
28 Q In that weather he would still go outside to smoke; is

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1 that correct?  
2 A Yes.  
3 Q Now, in response to another question -- question that  
4 Mr. Grossman asked you, he asked you about wearing patches.  
5 Remember that?  
6 A Yes.  
7 Q And --  
8 (Sneezing.)  
9 MR. PAUL: Bless you.  
10 Q (By MR. PAUL) And he would wear those patches and smoke  
11 at the same time?  
12 A Yes.  
13 Q And he was doing that when he was living with you; is  
14 that correct?  
15 A Yes.  
16 Q I think the question was asked, Did he do that because he  
17 wasn't allowed to smoke in your apartment? Do you remember  
18 that question by Mr. Grossman?  
19 A Yes.  
20 Q Was that your impression, that he needed the extra  
21 nicotine kick when he was living in your apartment?  
22 MR. GROSSMAN: Objection, your Honor.  
23 THE COURT: What's the objection?  
24 MR. GROSSMAN: The objection is he's -- he's asking for  
25 an expert opinion not -- not a --  
26 THE COURT: Sustain. Sustain as to form.  
27 Q (By MR. PAUL) Did you discuss with him whether he was  
28 doing that to get little extra nicotine kick?

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1 A No. My assumption was he was trying to quit.  
2 Q You were asked a question about -- well, let me go back a  
3 step.  
4 You were asked about the Surgeon General's Report and  
5 discussions that were held around the table, correct?  
6 A Yes.  
7 Q All right. Now, you said that you -- your mind was made  
8 up and you thought that there was a potential health hazard of  
9 smoking, correct?  
10 A Yes.  
11 Q You still continue to do it until 1988, right?  
12 A Yes.  
13 Q Okay. During this period of time you said there would be  
14 conversations with your sister Elouis and dinner table  
15 conversation and that kind of thing. Was there only one side  
16 of the story in those conversations?  
17 A No.  
18 Q Was there a side where somebody would talk about whether  
19 or not they accepted or believed these reports?  
20 A Uh, there was -- I recall there was discussion as to the  
21 fact that there was a controversy, that -- that there was  
22 another side of the argument.  
23 Q Okay. And would Larry participate in these conversations?  
24 A Uh, I recall he did. We all seemed to participate, all  
25 of us who were old enough to participate in those discussions.  
26 Q All right. And are you aware that there were programs or  
27 articles that were written about whether or not smoking caused  
28 lung cancer?

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1 A Yes.

2 Q About whether it caused emphysema?  
3 A Yes.  
4 Q And whether it caused heart disease?  
5 A Yes.  
6 Q And so your sister Elouis had one viewpoint, correct?  
7 A That's correct.  
8 Q But there were discussions of the other viewpoint,  
9 correct?  
10 A Yes.  
11 Q Do you know which PR firms or front groups were putting  
12 out the other side of the argument?  
13 MR. GROSSMAN: Objection to the form of the question.  
14 Move to strike it from the record.  
15 THE COURT: Stricken. Sustain.  
16 Q (By MR. PAUL) Do you know whether there were public  
17 relations groups working for the tobacco companies?  
18 MR. GROSSMAN: Objection, your Honor. Irrelevant, and  
19 for this witness.  
20 THE COURT: Sustained.  
21 Q (By MR. PAUL) Do you know who was putting out the  
22 controversy?  
23 MR. GROSSMAN: Objection, your Honor.  
24 THE COURT: What's the objection?  
25 MR. GROSSMAN: As to the form of the question.  
26 THE COURT: Sustained.  
27 Q (By MR. PAUL) Do you know where the controversy was  
28 coming from?

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1 MR. GROSSMAN: Same objection, your Honor.  
2 THE COURT: Sustained.  
3 Q (By MR. PAUL) These articles that you would see or these  
4 programs on television where the other side was being given --  
5 MR. GROSSMAN: Objection to the form of the question.  
6 THE COURT: Approach the bench, please.  
7 (The following bench conference was then had.)  
8 MR. GROSSMAN: Lack of foundation. The witness hasn't  
9 said he read articles or saw --  
10 MR. PAUL: Yes, he did. I asked him that question before  
11 and he said yes.  
12 THE COURT: The relevant part is the part where it  
13 involves the discussions at the dinner table and other places.  
14 That's the relevant concern, that's the knowledge of the  
15 plaintiff that is in issue here. These other things are really  
16 beyond the scope of the examination.  
17 MR. PAUL: No, because he asked him -- he said -- he even  
18 asked him in the question at his deposition whether or not he  
19 accepted this controversy or not and whether -- so he's opened  
20 the subject. I hadn't -- I didn't open the subject. He opened  
21 it. Excuse me. You put up here his deposition testimony.  
22 MR. GROSSMAN: Let me tell you why.  
23 MR. PAUL: I don't care why.  
24 MR. GROSSMAN: Let me explain.  
25 THE COURT REPORTER: I can only report one.  
26 THE COURT: Mr. Paul first.  
27 MR. PAUL: Once he put that issue up there, once you put  
28 that issue up, you put his state of mind at issue in this

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1 matter. You're the one that asked him what his belief was.  
2 THE COURT: Mr. Grossman.

3 MR. GROSSMAN: This is not to impeach his state of mind.  
4 THE COURT: Keep this down.  
5 MR. GROSSMAN: I don't take it the plaintiffs are seeking  
6 to impeach Mr. Lucier's, David Lucier's, state of mind. David  
7 Lucier's understanding of the risks of smoking are absolutely  
8 relevant to what he told his brother, Larry Lucier, on the  
9 risks of smoking throughout a lifetime. And I have no  
10 objection to -- to questions about David Lucier's knowledge or  
11 understanding or belief of the risk of smoking, but I certainly  
12 object to using him as a vehicle to reargue 20 times to the  
13 jury about -- about things that Mr. Lucier has never seen or  
14 read.

15 THE COURT: All right. I'm going to sustain the  
16 objection to that extent. I'll just entertain objections to  
17 specific questions as they arise. Let's proceed.

18 MR. GROSSMAN: Okay. Thank you.

19 (Bench conference concluded.)

20 Q (By MR. PAUL) Do you recall, Mr. Lucier, you were asked  
21 about some of your own beliefs about smoking and health?

22 A Yes.

23 Q They showed your testimony up here on the big screen,  
24 right?

25 A Yes.

26 Q Okay. Were you aware of the other side of the argument?

27 A Yes.

28 Q Did you see articles about the other side of the argument?

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1 A Yes.

2 Q Did you see television shows about the other side of the  
3 argument?

4 A Yes.

5 Q Did your brother see those?

6 A Yes.

7 Q Did you discuss these things with your brother?

8 A Not with him directly, but over the course of discussion  
9 at the dinner table and in the course of conversation.

10 Q Do you know who put out those articles?

11 MR. GROSSMAN: Objection, your Honor.

12 MS. FEY: Objection, your Honor.

13 THE COURT: Sustained. Relevance.

14 Q (By MR. PAUL) Well, you knew that one side was the  
15 Surgeon General, correct?

16 A Yes.

17 Q Do you have -- did you have any idea who the other side  
18 of the argument was?

19 A Yes.

20 Q What was your understanding of the other side of the  
21 argument?

22 A It was the tobacco industry.

23 Q Do you know whether they had a public relations company?

24 MR. GROSSMAN: Objection, your Honor.

25 MS. FEY: Objection, your Honor.

26 May we approach?

27 THE COURT: Yes.

28 Please don't overhear our conversation.

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1 (The following bench conference was then had.)

2 MR. GROSSMAN: Do you want to go first this time?

3 THE COURT: Miss Fey.

4 MS. FEY: The issue is still relevance. He is testifying  
5 that his brother did not tell him that he smoked or took any  
6 actions based upon anything Philip Morris did, anything  
7 Reynolds did, anything CTR, TIRC or TI did.

8 MR. PAUL: Well --

9 MS. FEY: It's irrelevant and a 352 issue as well.

10 MR. PAUL: They know that my client is going to come in  
11 and testify that he believed the material that was being put  
12 out by the tobacco companies; that it was very relevant this  
13 whole controversy issue. He said he discussed this issue. He  
14 discussed it around the dinner table. All I'm asking him is  
15 did he know that there was a public relations company that was  
16 working for the -- this idea of bringing up --

17 MR. GROSSMAN: I can't believe you're saying this.

18 MR. PAUL: Excuse me.

19 THE COURT: One at a time.

20 Come on. I'm not going to permit this. This is not  
21 going to get out of control.

22 MR. GROSSMAN: Okay. I'm sorry, your Honor.

23 THE COURT: Flat out.

24 MR. PAUL: Obviously to bring up, do you know who the  
25 Counsel for Tobacco Research is, do you know who TIRC is, do  
26 you know who TI is, those are the front groups that put out  
27 this information.

28 So the idea, the implication is oh, well, nobody knows

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1 who these people are, so they didn't have any impact. Their  
2 impact is through their advertising and through the documents  
3 that they put out to create this controversy, which this jury  
4 knows. All I'm asking him is whether he knew whether it was a  
5 public relations group. If his answer is no --

6 THE COURT: You can just ask him what the source is  
7 without a non-leading question, without introducing this  
8 additional concept.

9 MR. PAUL: I'll ask that one question and I'll basically  
10 be done.

11 THE COURT: All right.

12 (Bench conference concluded.)

13 Q (By MR. PAUL) Do you know what the source of this other  
14 side of the issue was, the side that said that there was a  
15 question or a dispute about the cause of these problems?

16 A Yes.

17 Q What was the source?

18 A The tobacco industry.

19 MR. PAUL: That's all I have. Thank you, your Honor.

20 THE COURT: Mr. Grossman.

21 MR. GROSSMAN: Thank you, your Honor.

22 RECROSS-EXAMINATION

23 BY THEODORE M. GROSSMAN, Attorney at Law, Counsel on behalf of  
24 the Defendant R.J. REYNOLDS TOBACCO COMPANY:

25 Q Going back to the mid-1960s, Mr. Lucier. It's your  
26 recollection, isn't it, that not only you, but as you recall  
27 even the tobacco industry didn't think there was a controversy?

28 A I thought there was a controversy. The controversy was

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1 where there's smoke -- there's a correlation between smoking  
2 and health effects. That was the controversy.

3 Q Page -- Mr. Paul page 158, line 16 through page 159, line  
4 two. Tell me when you're ready.

5 (Pause.)  
6 MR. PAUL: You're reading to line?  
7 MR. GROSSMAN: To line 2.  
8 MR. PAUL: Would you read to line 8 on page 159?  
9 MR. GROSSMAN: I have no problem with that.  
10 MR. PAUL: Okay.  
11 THE COURT: Okay.  
12 MELANIE ROBERTS: Counsel, did you say --  
13 MR. GROSSMAN: 158, line 16 through 159 line 8.  
14 (The following videotape excerpt was played and  
15 reported.)  
16 Q During this time, do you recall whether or not the  
17 tobacco industry was still saying that there was no definitive  
18 causal relationship between cigarette smoking and health risk?  
19 MS. SCHRANDT: Objection.  
20 MS. POLE: You can answer.  
21 THE WITNESS: My recollection is that they didn't think  
22 there was a controversy. I thought there wasn't a  
23 controversy. I thought that the evidence was -- that the  
24 preponderance of the evidence or, you know, conclusive evidence  
25 for me showed that there was a causal relationship.  
26 Q Okay. Did you -- do you recall during the late sixties  
27 when we were talking about when Elouis had the message, do you  
28 recall ever seeing the tobacco industry admit that cigarette

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1 smoking caused lung cancer?  
2 A Uh, I don't recall them ever admitting that.  
3 (Videotape excerpt concluded.)  
4 Q (By MR. GROSSMAN) Okay. Mr. Lucier, mid-1960s, you  
5 thought there wasn't a controversy about smoking and health,  
6 right?  
7 A Let me -- let me -- I mean, I'm seeing a difference here  
8 between what I thought and what they thought and was there a  
9 controversy -- was there a public controversy versus was there  
10 a controversy in my mind.  
11 MR. GROSSMAN: Move to strike.  
12 THE COURT: Please just respond to the question.  
13 THE WITNESS: Okay. Repeat the question.  
14 THE COURT: We need a further question.  
15 Q (By MR. GROSSMAN) In the mid-1960s -- by the mid-1960s,  
16 you were convinced that smoking caused lung cancer, emphysema,  
17 and heart disease.  
18 A I felt there was a -- the preponderance of evidence was  
19 that there was a correlation.  
20 Q You didn't try to stop smoking until 1988.  
21 A That's correct.  
22 Q In the mid-1960s you were 17, 18 years old.  
23 A Yes.  
24 Q And it was your choice to continue smoking and not to try  
25 to stop until 1988; is that right?  
26 A I continued to smoke.  
27 Q And you chose not to try to stop; is that correct?  
28 A Well, I didn't consider stopping.

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1 Q Okay. And you didn't consider stopping until you decided  
2 to stop, right?  
3 A Uh, probably before that.  
4 Q A little bit before that?  
5 A I'd say several years before that.

6 Q Okay. And you smoked all those years with the belief  
7 that cigarettes cause lung cancer, emphysema, and heart  
8 disease; is that correct?

9 A Yes. That became my belief.

10 MR. GROSSMAN: I have no further questions. Thank you.

11 THE COURT: Miss Fey?

12 MS. FEY: Your Honor, I have no further questions.

13 THE COURT: Mr. Paul?

14 MR. PAUL: Nothing further, your Honor.

15 THE COURT: You may step down. Thank you.

16 We'll take the lunch recess until 1:30.

17 Let me remind you, do not discuss the case among  
18 yourselves or with anyone else. Avoid any exposure to any  
19 media reports or anything associated with this case or with  
20 anything associated with the subject matters that are in  
21 controversy here. Remember that as it relates to the  
22 attorneys, the witnesses, the participants, you must not talk  
23 to those folks at all, period, except here formally in open  
24 court.

25 Have a nice lunch. 1:30.

26 (The following proceedings were then had in open court  
27 outside the presence of the jury.)

28 THE COURT: Okay. The jury is gone now.

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1 There aren't any preliminary matters that have to be  
2 taken up this afternoon, are there?

3 MR. PAUL: No. We have Dr. Gandara here this afternoon.

4 THE COURT: All right. What about tomorrow morning?

5 What about tomorrow?

6 MR. PAUL: Tomorrow, I have Dr. Collins in the morning.  
7 Now, we're starting at 10:00 o'clock tomorrow?

8 THE COURT: Right. 10:00 o'clock.

9 MR. PAUL: And after that -- I'm not sure how long she  
10 will take, but after that it probably would make sense for us  
11 to perhaps think about the objections on Doll and try to get  
12 some of those worked out, because we may have some extra time.

13 Then I have two short witnesses on Thursday morning. I'm  
14 not sure how short they'll be now, but we have two more  
15 witnesses on Thursday morning who will be shorter than  
16 Mr. Lucier. And then after that, it may make sense for us to  
17 play the Doll testimony since it lasts almost six hours,  
18 depending on what the Court's rulings are on some of the  
19 objections. And that will probably take us through Friday.

20 THE COURT: Okay. 1:30. Thanks.

21 (Lunch recess.)

22 -----oOo-----  
23  
24  
25  
26  
27  
28

SACRAMENTO COUNTY OFFICIAL COURT REPORTERS 6179

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1 TUESDAY, DECEMBER 10, 2002

2 AFTERNOON SESSION

3 The matter of LAURENCE LUCIER and LAURIE LUCIER,  
4 Plaintiffs, versus PHILIP MORRIS INCORPORATED and  
5 R.J. REYNOLDS TOBACCO COMPANY, Defendants, Case No. 02AS01909,  
6 came on regularly this day before the Honorable Steven H.

7 Rodda, Judge of the Superior Court of the State of California,  
8 for the County of Sacramento, Department One at 1:30 p.m.

9 The Plaintiffs, LAURENCE LUCIER and LAURIE LUCIER, were  
10 represented by: GARY M. PAUL, Attorney at Law; ROBERT M.  
11 BROWN, Attorney at Law (not present); and MARY ALEXANDER,  
12 Attorney at Law.

13 The Defendant, PHILIP MORRIS INCORPORATED, was  
14 represented by: GERALD V. BARRON, Attorney at Law; LAURA C.  
15 FEY, Attorney at Law; DEBORAH A. SMITH, Attorney at Law; and  
16 ANNIE Y.S. CHUANG, Attorney at Law (not present).

17 The Defendant, R.J. REYNOLDS TOBACCO COMPANY, was  
18 represented by: THEODORE M. GROSSMAN, Attorney at Law; STEVEN  
19 N. GEISE, Attorney at Law; HAROLD K. GORDON, Attorney at Law;  
20 DANIEL J. McLOON, Attorney at Law; and ELIZABETH P. KESSLER,  
21 Attorney at Law.

22 (The following proceedings were then had in open court  
23 outside the presence of the jury.)

24 THE COURT: Okay. Sorry. Ready to go, are we?

25 MR. PAUL: Yes, your Honor.

26 THE COURT: Okay. Bring the jury in.

27 (The following proceedings were then had in open court in  
28 the presence of the jury.)

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1 THE COURT: Good afternoon.

2 MR. PAUL: Good afternoon your Honor.

3 THE COURT: Are we ready, Mr. Paul?

4 MR. PAUL: I am, your Honor.

5 THE COURT: Okay.

6 MR. PAUL: I'd like to call Dr. David Gandara.

7 THE CLERK: Would you raise your right hand.

8 Do you solemnly swear the testimony that you shall give  
9 will be the truth, the whole truth, and nothing but the truth  
10 so help you God?

11 THE WITNESS: I do.

12 THE CLERK: Please be seated.

13 Please state and spell your name for the record.

14 THE WITNESS: David Gandara, G-A-N-D-A-R-A.

15 THE CLERK: Thank you.

16 TESTIMONY OF  
17 DAVID GANDARA, M.D., a witness called on behalf of the  
18 Plaintiffs:

19 DIRECT EXAMINATION

20 BY GARY M. PAUL, Attorney at Law, Counsel on behalf of the  
21 Plaintiffs:

22 Q Good afternoon.

23 You're a doctor of medicine, sir?

24 A I am.

25 Q And you're licensed to practice medicine in the state of  
26 California?

27 A I am.

28 Q Since what date, sir?

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1 A Uh, my license in California is from 1976 onward.

2 Q And you have a practice at this point in time, sir?

3 A I do.

4 Q And where is it located?

5 A It's at the UC Davis Cancer Center here in Sacramento.

6 Q And what is the nature of your practice at this point?

7 A I see -- I'm a medical oncologist, so I see patients

8 primarily with cancer and my specialty is lung cancer.  
9 Q And do you have a position with the UC Davis Cancer  
10 Center?  
11 A I'm a professor of medicine at UC Davis. I'm the  
12 director of clinical research for the cancer center and  
13 director of the thoracic oncology program which is lung-related  
14 diseases.  
15 Q I'm going to talk to you about a couple -- by the way,  
16 you and I met for the first time today at, what, about 1:10  
17 outside the courtroom, right?  
18 A Yes. That's right.  
19 Q You have had a chance before to talk to Mr. Bob Brown; is  
20 that correct?  
21 A That's right.  
22 Q All right. Let's talk a little bit about some of the  
23 terms that you've used. First the term "oncology." Can you  
24 define for the Court and the jury what an oncologist is.  
25 A That's a specialty of cancer. So cancer detection,  
26 cancer treatment.  
27 Q And in order to become an oncologist you have to go  
28 through certain kind of training.

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1 A That's right.  
2 Q Can you tell us what your educational background is,  
3 starting with college up to the point in time that you began to  
4 practice in the field of oncology.  
5 A I did my undergraduate work in college at the University  
6 of Texas in Austin, then went to Medical School at the  
7 University of Texas, Galveston. I did my internship and  
8 residency at Madigan Army Medical Center in Tacoma, Washington,  
9 and then a fellowship subspecialty training in hematology and  
10 oncology, and that was at Letterman Hospital in San Francisco.  
11 Q You used the term "hematology." What is "hematology"?  
12 A "Hematology" is diagnosis and treatment of blood  
13 disorders. And they have historically been linked to cancer  
14 because the first cancers that were treated were leukemias.  
15 Q So would it be fair to say that the great majority of  
16 your practice involves cancer patients?  
17 A Yes.  
18 Q Does a certain proportion of your practice include  
19 patients with lung cancer?  
20 A Yes.  
21 Q Can you tell us your best estimate of what proportion of  
22 your patients that you treat have lung cancer.  
23 A Overall, I'd say it's about 70, 75 percent.  
24 Q Sir, do you believe that smoking causes lung cancer?  
25 A Yes.  
26 Q Is there any question in your mind about that?  
27 A None whatsoever.  
28 Q Now, you have occasion to teach, do you?

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1 A Yes.  
2 Q Since you're a full professor, I take it you must teach  
3 at UC Davis from time to time.  
4 A I do.  
5 Q Who do you teach?  
6 A I teach everyone from medical students to interns and  
7 residents, fellows who are training in hematology, oncology,  
8 other physicians. Sometimes even high school students we have

9       rotating doing special projects.  
10      Q       And for how long have you been teaching?  
11      A       Since I graduated from my fellowship in 1979.  
12      Q       Okay. Do you just work out of the Sacramento area?  
13      A       I also have an appointment with the VA,  
14     Veterans' Administration. So on Mondays I have a clinic in  
15     Martinez where UC Davis does the cancer treatment for the  
16     Northern California VA system.  
17      Q       So you'll spend one day in Martinez then?  
18      A       Yes.  
19      Q       And then you'll spend the rest of the week here in the  
20     Sacramento area?  
21      A       That's right.  
22      Q       Okay. And on -- on a regular -- how do you fit together  
23     the teaching plus a clinical practice? What proportion of your  
24     time is taken up in teaching?  
25      A       Uh, strictly teaching is about 20 percent of my time.  
26     But a lot of the teaching is in conjunction with seeing  
27     patients. In other words, it's a part of my practice. So  
28     students, residents rotate through oncology, that's part of  
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1       their training, and actually spend time with us at the bedside  
2     or in the clinic seeing patients and learning about lung  
3     cancer. So it's -- it's blended together to a certain extent.  
4      Q       All right. As an oncologist, do you find yourself also  
5     having to work with other disciplines, such as, radiology?  
6      A       Yes, especially for lung cancer. It's more and more what  
7     we call multidisciplinary, which means you really have a group  
8     of physicians working together to do the diagnosis, staging and  
9     then management of the patient.

10     So at UC Davis we actually have a conference once a week  
11    where we see all the patients together in clinic and then sit  
12    down and present the cases with the radiologist, with the  
13    radiation doctor, the surgeon, the medical oncologist like  
14    myself and all jointly make treatment decisions. So we work  
15    hand in hand with the other specialties.

16      Q       And would that be true with pulmonologists?  
17      A       Yes.  
18      Q       And from time to time do you -- it sounds like you sort  
19     of already answered this question but let me ask you, do you  
20     get involved in making the decision on what kind of treatment,  
21     if any, will be provided to a patient, let's say, who is  
22     suffering from lung cancer?

23      A       Yes.  
24      Q       It's therefore necessary for you to know the various  
25     modalities of treatment, whether it be chemical or whether it  
26     be radiation?

27      A       That's right.  
28      Q       Okay. So you need to keep yourself conversant with what

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1       the latest developments are in those areas, correct?  
2      A       Well, not only that, for the National Cancer Institute, I  
3     run a large program of about 150 physicians from all the  
4     specialties concentrating in lung cancer to do clinical trials,  
5     to investigate new treatments. So as part of that group, the  
6     committee that I'm the chair of, there are about 130 physicians  
7     from all different specialties.  
8      Q       All right. Let's talk about that for a second. What is  
9     the nature of the study that's being done under the auspices of

10 the National Cancer Institute?  
11 A There are a whole host of studies. Our particular  
12 committee has about, oh, 20 or 25 studies that are either  
13 currently active or in development, and they vary every -- as  
14 far as treatment of patients with advanced lung cancer to  
15 treatments of patients with early lung cancer to a trial for  
16 smoking cessation to try to get patients who have been prior  
17 smokers to stop smoking.

18 Q And so when you say you chair one or more of these  
19 studies, what do you mean by -- which studies are you involved  
20 in that you actually chair?

21 A I'm the chairman of the entire committee that develops  
22 the studies, conducts the studies, analyzes the studies and  
23 presents them.

24 Q And how many physicians did you say are involved in the  
25 study?

26 A It's well over a hundred. Probably about 130.

27 Q Is that a national study or just here in California?

28 A It's in all 50 states.

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1 Q All 50.

2 And is there some particular type of cancer patients that  
3 are being looked at in this study?

4 A Well, these are all -- all of these studies involve lung  
5 cancer patients.

6 Q Is there a particular portion of the study that deals  
7 with patients who have lung cancer that has metastasized to the  
8 brain?

9 A Well, we don't have what's called a clinical trial for  
10 those patients. In other words, something where we're taking  
11 the patients with lung cancer who have a brain metastasis and  
12 look at them -- looking at them prospectively.

13 But what we're doing, and we're actually doing it right  
14 now, is patients with the same stage of lung cancer as  
15 Mr. Lucier, stage 3, we're looking at all of the patients that  
16 we have treated over the last ten years in the Southwest  
17 Oncology Group, in particular to who developed metastasis, when  
18 did they develop it, and what is their subsequent outcome.

19 So we're -- we're using our database, we call it, to look  
20 at that specific issue, but we haven't completed it yet.

21 Q You're moving toward the completion date on it.

22 A December 20th.

23 Q December 20th of this year?

24 A Because that's when it has to go into the national cancer  
25 meeting so we can present it next year.

26 Q All right. So the date is being accumulated over about a  
27 ten-year period, and as the end of the year approaches you sort  
28 of then finalize and then submit it to the National Cancer

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1 Institute?

2 A Actually, it's called ASCO. It's the American Society of  
3 Clinical Oncology.

4 Q Okay. All right. We'll talk about Mr. Lucier more in a  
5 second.

6 What you're doing now, sitting in a witness chair in a  
7 courtroom is something that you do very rarely. Would that be  
8 a true statement?

9 A I used to do it more. It was never that common, but I'm  
10 so busy doing all these other things I really don't have time

11 for it. I think this is the first time I've been in a  
12 courtroom in, I don't know, five years or something like that.

13 Q And the reason that you're here today, sir, is because  
14 you've had occasion to see Mr. Larry Lucier; is that correct?

15 A I've been his treating oncologist since April of the year  
16 2000.

17 Q Okay. And he has seen you periodically over that period  
18 of time; would that be correct?

19 A Yes. On average, I think probably every three to four  
20 months.

21 Q Okay. How is it that you first ended up seeing  
22 Mr. Lucier?

23 A He had had his initial treatment in Santa Rosa because he  
24 was living there and then subsequently moved to Arizona, I  
25 think, to be closer to family as I recall. And then he and his  
26 wife relocated to Sacramento, I think, because his wife got a  
27 job here.

28 Q All right. And so when he came to the Sacramento area

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1 you began to see him as an oncologist, correct?

2 A Right.

3 Q Would that have been before he was diagnosed as having a  
4 metastasis to the brain?

5 A Yes.

6 Q Okay. Now, when you first had occasion to see  
7 Mr. Lucier, what would be the nature of your practice? What  
8 would you do when you were seeing a patient for the first time  
9 who had had treatment for cancer elsewhere?

10 A We did a consultation. We reviewed all of his records,  
11 his laboratories, his scans, the office visits, really every  
12 component of his treatment, and made an assessment about did we  
13 agree with the diagnosis, did we agree with the treatment, and  
14 what needed to be done at that point.

15 When he came to see me there was a question of whether  
16 he had recurrent cancer in his lung. So we ordered repeat CT  
17 scans and PET scans. That was the first thing we did to try to  
18 sort that out.

19 Q All right. Let's take it a step at a time.

20 One of the things that you would have done then was to  
21 obtain the previous records on him to see what the previous  
22 treatment had been, correct?

23 A That's right.

24 Q And in doing that, you did what you called an assessment.  
25 You would evaluate what was done before. And is this something  
26 you do independently, to determine whether or not you agree  
27 with A, the diagnosis that they made, and B, the treatment they  
28 provided?

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1 A Yes, that's right. I mean, sometimes we may disagree.  
2 We may think that the diagnosis is different, or we may have  
3 recommended other treatment. It may have already been done.  
4 But, in other words, we make an assessment of the case.

5 Q All right. And when you first had occasion to review the  
6 records, to do the assessment of him, did you reach your own  
7 opinion as to his diagnosis at that point?

8 A Yes.

9 Q What was your diagnosis, sir?

10 A That he had a lung cancer, non-small cell lung cancer  
11 that was stage 3A, treated with chemotherapy and radiation, and

12 that we weren't sure at that point whether he had recurrence or  
13 not.

14 Q All right. Now, when you say "recurrence," perhaps you  
15 can define that term for us.

16 A Well, I'm talking about the cancer coming back.

17 Q And was there something that indicated to you that it  
18 might have come back?

19 A Actually, I have my notes here that I can refer to but --  
20 Q Please do.

21 A -- he had a CT scan, I think, in Arizona which was felt  
22 to be suspicious for recurrence.

23 Q If you need to refer to your records, please do, sir.

24 A So I brought these. I guess they've already been  
25 entered. This is a copy of my records that came to me, and  
26 these are my additional records since the time of my last  
27 deposition so that I have a fairly complete set.

28 Q Your deposition has been taken in this case, has it not?

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1 A Three times.

2 Q Okay.

3 MR. GORDON: Judge, could we approach for a second?

4 THE COURT: Yes.

5 (The following bench conference was then had.)

6 MR. GORDON: If we're going to get into the substance of  
7 prior records either by your questions or him reviewing the  
8 prior records, I would ask that we have that same instruction  
9 from the BAJI that we had read with the last --

10 MR. PAUL: Oh, sure.

11 MR. GORDON: -- expert witness.

12 MR. PAUL: Well, we've had the one read about relying  
13 on -- you mean on the patient's comments to him?

14 MR. GORDON: On any prior --

15 MR. PAUL: Oh, no. That doesn't go to all records.

16 THE COURT: Well, let's continue with the examination,  
17 and if there's a need for it, I'll consider it on request, to  
18 see how the testimony develops to determine whether or not  
19 there's a need to redo that.

20 MR. PAUL: Just so I'm clear, I mean, as an expert he can  
21 rely on previous medical records.

22 MR. GORDON: Right, right. I just thought we were  
23 getting to an out-of-court statement.

24 What is your understanding as to when that BAJI is given?

25 MR. PAUL: It's for when a -- what a patient says to a  
26 doctor.

27 MR. GORDON: Right.

28 MR. PAUL: I'm not getting into anything that's been said  
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1 to a doctor.

2 THE COURT: That's admissible usually as a statement of  
3 state of mind, physical sensation, emotion, under Evidence Code  
4 Section.

5 MR. PAUL: I don't think there will be a problem. If it  
6 is, let me know.

7 MR. GORDON: We'll take it step by step.

8 THE COURT: Okay.

9 (Bench conference concluded.)

10 Q (By MR. PAUL) I'm sorry, Doctor. You were looking at a  
11 note regarding recurrence and why you needed -- or wanted to do  
12 some further testing.

13 A When we saw him in April of 2000, he had had a CT scan  
14 done in February that year which showed a possible mass that  
15 might be a recurrence of the cancer.  
16 Q All right. And as an oncologist, the fact that a cancer  
17 might recur is of concern to you?  
18 A Well, it's a huge concern. Because he -- maybe I should  
19 just back up. If I can elaborate for just a minute.  
20 I mean, lung cancer is divided into four stages. Stage 1  
21 is the earliest and stage 4 is the most advanced. He already  
22 had stage 3 in 1999. If he had recurrent disease, then in the  
23 great majority of cases that's a death warrant. In other  
24 words, even though he might be treated for that and he might  
25 get a remission, it's eventually going to come back and kill  
26 him in the majority of cases. So sorting out whether he had  
27 recurrence was very important because he had been treated for  
28 cure.

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1 Q Okay. Now -- so you -- just so I can go back a step.  
2 When you had made your -- your assessment and you had  
3 reached your diagnosis of -- is it non-small cell cancer?  
4 A Yes.  
5 Q Okay. Of the lung.  
6 By the way, did you make that with a reasonable degree of  
7 medical probability?  
8 A Yes.  
9 Q All right. So when you got this record from Arizona and  
10 there was this potential mass, what is it that as a doctor you  
11 did to check further to see whether he did have a recurrence?  
12 A As I mentioned earlier, we ordered a repeat CT scan  
13 because by and large if it is a recurrence then the tumor will  
14 grow over time.  
15 Q And what did you find on your repeat scan?  
16 A It looked very stable. We also did another type of scan  
17 called a PET scan. The CT scan looks at anatomy. The PET scan  
18 looks at metabolism. You actually get injected with a glucose,  
19 a sugar-water solution. And the tumor cells use sugar more  
20 than the normal cells, so if there's a tumor in there, often  
21 it will light up. In other words, it will collect this  
22 glucose, and therefore whatever the abnormality is on the CT  
23 scan, if you can't tell if it's cancer or not, if it lights up  
24 on the PET scan, then you're pretty convinced that it's cancer.  
25 Q And the results of these two tests, the CT scan and the  
26 PET scan, indicated to you what?  
27 A That he did not have a recurrence at that point, to the  
28 extent that the tests could show it.

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1 Q All right. There is a limit to the tests showing cancer  
2 cells; is that correct?  
3 A Yes. For instance, the PET scan is only good for tumors  
4 about -- bigger than about so big (indicating). In other  
5 words, a half a centimeter to a centimeter.  
6 Q Okay. All right. You put your fingers together, but you  
7 answered the end of it when you said a half a centimeter to a  
8 centimeter.  
9 A So below that, there could be cells that you just can't  
10 detect.  
11 Q All right. Well, after you made this determination that  
12 there hadn't been a recurrence, what was the next step then in  
13 dealing with Mr. Lucier?

14 A Then it was just follow-up every three to four months,  
15 checking his symptoms, checking his physical exam, and  
16 periodically doing repeat CT scans.  
17 Q All right. And the fact that you would do it every three  
18 or four months, was there some rationale between -- was there  
19 some rationale to that time period?  
20 A It's a divided scale. So that for the first two or so  
21 years after someone has had a diagnosis like this you do the  
22 scans more frequently, and then as time goes by you can spread  
23 them out further because the risk of recurrence becomes less.  
24 Q Okay. Now, what was the next event that occurred with  
25 Mr. Lucier? He saw you every three or four months. What was  
26 the next major event in your care?  
27 A In January of 2001, he had a seizure. And I was called  
28 to see him in the hospital. He had already been admitted to UC

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1 Davis Medical Center and had had a CT scan of the brain which  
2 showed a brain metastasis.  
3 Q And were you involved in the diagnosis of that metastasis?  
4 A Well, I was involved as his oncologist. In other words,  
5 many people were involved. We ended up recommending surgical  
6 resection, so there were neurosurgeons involved. There was the  
7 team of radiologists that performed the studies. But, yes, I  
8 was coordinating the efforts as his oncologist.  
9 Q And was a diagnosis made as to the nature of the -- of  
10 the cancer that was found in his brain?  
11 A Yes.  
12 Q What was that diagnosis, sir?  
13 A It was metastatic lung cancer.  
14 Q And was that with reasonable medical probability that the  
15 cancer in his brain was metastatic lung cancer?  
16 A Absolutely. In fact, our pathologist did an entire  
17 battery of special stains to try to sort out, you know, where  
18 this metastasis could have come from, and it was very  
19 characteristic of a lung cancer primary.  
20 Q Okay. Now, the treatment that was then suggested for  
21 him, you used the term "resection." Can you tell us what  
22 "resection" means.  
23 A Surgical resection. In other words, the neurosurgeons  
24 went in and took out the tumor.  
25 Q Okay. And do they take -- when they take the tumor out,  
26 do they also take out some surrounding tissue?  
27 A They try to. It depends on the location and how much  
28 normal brain would be damaged. I should add that in all of

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1 these cases the surgical resection is followed by giving  
2 radiation to the brain. And the reason is no matter how  
3 careful they are in trying to take out all the tumor, there  
4 could be some microscopic cells that are out within the brain  
5 tissue that weren't removed, so the radiation is done to  
6 sterilize those areas.  
7 Q And how much radiation was he given?  
8 A He got around 36 grey, that's G-Y, which is just an  
9 abbreviation for the amount of radiation. So it's a pretty  
10 good dose to the brain. Pretty substantial.  
11 Q And then after he had had this resection and he had had  
12 the radiation, did you continue to follow him?  
13 A Yes.  
14 Q And how often would you see him after those procedures?

15 A Well, when he had some problem like this, of course, I  
16 saw him more frequently until we sorted it out, and then I  
17 would spread it back out to the every three to four-month  
18 period.

19 Q Okay. And would you continue to check on him by doing  
20 CT scans and/or PET scans?

21 A Yes.

22 Q How much would those be done?

23 A As I mentioned, the CT was routinely ordered every three  
24 to four months. The PET scan was done for purposes, in other  
25 words, to help to try to sort out problems.

26 Q And how many CT scans has he had from the time that you  
27 first saw him until the present time, your best estimate?

28 A Uh, I don't know. Eight -- I mean, he's had quite a few  
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1 because he's had some subsequent problems that required him to  
2 get more CT scans than we would have done ordinarily.

3 Q And if I asked you the same question about PET scans?

4 A Uh, I think he's had four, but I'm not sure. I'd have to  
5 look back in the records to make sure.

6 Q Now, have any of the CT scans -- now, I'm going to talk  
7 post-surgery on his brain, the resection. Post that time, have  
8 either the CT scan or the PET scans that have been done  
9 indicated any recurrence of the cancer?

10 A Uh, twice. He became very ill with fever and coughing  
11 and shortness of breath and was either seen in the emergency  
12 room or hospitalized. And a CT scan was done, and the initial  
13 interpretation was that the lymph nodes in the mediastinum,  
14 which is the center part of the chest, where he originally had  
15 his biopsy from were enlarged again. So there was great  
16 concern by myself and everybody else who saw him that his  
17 disease, his cancer had come back.

18 That's when I ordered the PET scans and also when I  
19 allowed some time to go by and then did a repeat CT scan. And  
20 in both instances the lymph nodes had shrunk back down, it was  
21 really just reactive to infection probably, and we were able to  
22 tell him he didn't need further treatment at that point. At  
23 one point we had already told him what we were going to get him  
24 treated with and set him up for treatment, but then the tests  
25 turned out to be negative so, of course, we told him and we  
26 didn't treat him.

27 Q All right. So at this point in time -- we'll bring it up  
28 to today now. At this point in time, by CT scan and PET scan,

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1 does he have clinically observable cancer in his body based on  
2 those tests?

3 A No.

4 Q Okay. Does that mean he's cancer free?

5 A Well, we can't say that. And the greatest concern in his  
6 case is this brain metastasis. Because ordinarily cancer  
7 doesn't go -- in other words, all these metastases are single  
8 cell to start with, and it's very rare that it's just a single  
9 cell that went to the brain, to one spot, and there aren't some  
10 other cells somewhere else.

11 And we've got, you know, a lot of information about  
12 patients in various stages who had various types of metastases  
13 or not and then what happens afterwards. So his prognosis  
14 after this brain metastasis, even though we treated it  
15 aggressively with surgery and radiation, is still poor.

16 Because there could be other cells out there. And sometimes  
17 they stay dormant for years. In other words -- you know, and  
18 then something activates them, and there are all sorts of  
19 theories about it. But at any rate, his prognosis is still  
20 poor.

21 Q Now, let's talk a little bit about his condition as it  
22 now exists. How would you describe or diagnosis his physical  
23 condition -- when's the last time -- let me go back a step.

24 A When's the last time that you saw him?

25 A I brought my notes so that I'd make sure I could reflect  
26 things accurately. I last saw him on September 18, and at that  
27 time he had mild shortness of breath. He had had these  
28 episodes, as I mentioned, where he had severe shortness of

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1 breath and required treatment with antibiotics and  
2 bronchodilators. But at the time I saw him, he was in a good  
3 state from that and was not requiring any medication for that.  
4 He has fatigue, which I graded as mild at that point. He was  
5 having no cough, and his main complaint was memory loss.

6 On his examination, he has what we called alopecia, it's  
7 hair loss, from his prior radiation to his head. And I didn't  
8 hear any wheezing or abnormal sounds in his lung as I had heard  
9 previously when he was having these bouts of bronchiectasis.  
10 And the remainder of his exam was okay.

11 Q Now, you used the term "bronchiectasis." Is that the  
12 term?

13 A Yes.

14 Q Can you spell it for us.

15 A Let me see if I can write it first. I think it's  
16 B-R-O-N-C-H-I-E-C-T-A-S-I-S.

17 Q And what does it mean to in layman's terms?

18 A It's dilated and distorted bronchi, which the bronchi are  
19 the breathing tubes in the lung. It's kind of like thinking  
20 about varicose veins in the legs only it's the bronchi in the  
21 lungs, which can occur due to a lot of things, and one of those  
22 is radiation to the lungs can cause this problem.

23 So it's not that uncommon that patients who live long  
24 enough after receiving radiation to their lung will develop  
25 what we call fibrosis, which is scaring, and sometimes involved  
26 with that scaring is this dilated bronchi which are then  
27 susceptible to infection. So we think that's the reason he's  
28 having these recurrent bouts of infection. Pulmonary fibrosis

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1 and bronchiectasis.

2 Q You used the term "fibrosis." What's that means?

3 A Scaring.

4 Q So in other words, when one gets irradiated, it ends up  
5 doing some scaring; is that correct?

6 A Right.

7 Q So the radiation would have been in the area where the  
8 original tumor was located?

9 A That's correct.

10 Q And so you see some of this scaring in the lungs?

11 A Yes. On the CT scans it's very prominent.

12 Q Okay. And so this scaring then has a tendency to affect  
13 the bronchiales, as you've indicated, and can be a problem with  
14 infection, correct?

15 A Yes.

16 Q Can it also be disabling?

17 A Oh, it can be. Some patients develop a problem like this  
18 and it never progresses beyond a certain point. Some patients  
19 it continues to get worse, because every time he gets an  
20 infection it can exacerbate the bronchiectasis and these  
21 dilated bronchi, so over time it can get worse.

22 Some patients, for instance, have had to have attempted  
23 surgery, or they're on chronic antibiotics or other things for  
24 bronchiectasis. It can be quite severe. Bleeding. Also it  
25 tends to cause bleeding, which he has not had, I don't think.

26 Q And has he had more than one episode of this condition?

27 A To my best recollection he's had three. The last one  
28 requiring hospitalization, so it was pretty severe.

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1 Q And as time goes by is this a condition that's likely to  
2 get better, stay the same, or get worse?

3 A It's not likely to get better. I don't know whether it's  
4 going to stay the same or get worse.

5 Q Okay. Now, you've seen him over the last couple years.  
6 Is he still smoking?

7 A He smokes off and on. Sometimes he's on the wagon,  
8 sometimes he's off the wagon. When I saw him the last time in  
9 September he said he was smoking three to four cigarettes a  
10 day.

11 Q Okay. Have you tried to get him to stop?

12 A Yes. From the time of our initial visit.

13 Q You told him to stop?

14 A Yes.

15 Q You suggested ways that he might stop?

16 A Yes.

17 Q Has he stopped from time to time?

18 A Yes.

19 Q But then he goes back to it?

20 A Yes.

21 Q You're an oncologist. Do you think he's addicted to  
22 smoking?

23 A Yes.

24 MR. GORDON: Objection.

25 THE COURT: What's the objection?

26 MR. GORDON: Foundation. Beyond this witness' specialty.

27 THE COURT: Sustain at this point.

28 Q (By MR. PAUL) Do you diagnosis cancer patients as to

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1 whether or not they're addicted to smoking?

2 MR. GORDON: Judge, we need to approach.

3 THE COURT: Okay.

4 (The following bench conference was then had.)

5 MR. PAUL: I have more than one problem?

6 MR. GORDON: Well, beyond my objection, which was he's  
7 not a psychiatrist or psychologist, even if he says, you know,  
8 I have foundation, we have an agreement with Bob Brown that  
9 only Benowitz was going to provide any opinion.

10 MR. PAUL: All right. I'll move on. I'll move on. I'll  
11 move on.

12 THE COURT: All right.

13 (Bench conference concluded.)

14 Q (By MR. PAUL) Now, I want to touch on one -- one last  
15 area of this fibrosis issue. When you do a CT scan of the  
16 chest, can you see this fibrosis?

17 A Yes. It's -- the descriptor, they talk about fibrosis,

18 but what it is is kind of a linear stranding. It's like a  
19 scar. There are multiple scars in the lung.

20 Q And if you have that kind of scaring in the area of the  
21 original tumor, can you tell by scan, CT or PET, whether there  
22 are still cancer cells in that area?

23 A No. As a matter of fact, it makes it very difficult.  
24 And we're trying to actually devise some additional ways for  
25 differentiating whether there's really cancer there versus just  
26 scar.

27 Q What do you mean you're trying to devise some ways?

28 A Well, we have a pilot project as part of the Southwest  
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1 Oncology Group where we're developing a special computer  
2 assisted image analysis of the CT scans to help us define how  
3 much is tumor and how much is not. Because sometimes, just  
4 like in his case, it can be very, very hard to distinguish  
5 post-radiation changes from recurrent cancer.

6 Q Can you tell the Court and jury what you believe the  
7 chances are that he has cancer still existing in his body.

8 A I think the chances are --

9 MR. GORDON: Objection; foundation at this time.

10 THE COURT: Sustain.

11 Q (By MR. PAUL) You're doing studies on the issue of --  
12 well, you were telling us about an NCI study or this  
13 organization, this group that you were doing the study on,  
14 cancers; is that correct?

15 A Yes.

16 Q And one of the things you're evaluating in this study is  
17 the ability to determine whether or not people have or do not  
18 have detectable cancer in their body after they have been  
19 diagnosed with it and treated?

20 A Well, this study is focusing on the brain metastasis  
21 directly. But there's quite a bit of information from prior  
22 studies that have been done to say that somebody in his  
23 situation, or even somebody better than his situation, somebody  
24 who even had earlier stage lung cancer who had surgery for that  
25 lung cancer and then develops a brain metastasis, the chance of  
26 them subsequently developing more metastasis, either in the  
27 brain or outside, is at least 80 percent, and that they will  
28 die of that cancer, and that at five years almost none of them

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1 will be left alive.

2 Now, that's in patients even with earlier stage. Like I  
3 said, we don't know as much about patients in his stage.  
4 That's what we're studying. But even if you give him the best  
5 prognosis, in other words, that of somebody with an earlier  
6 stage cancer, it's more likely than not.

7 I guess my estimate at this point, since he's gone some  
8 time further from his resection of his brain metastasis, is 70  
9 percent chance that he still has residual cancer that's below  
10 the level of detection that will eventually kill him.

11 Q If it recurs?

12 A If it recurs.

13 Q If it recurs, what chance does he have for survival?

14 A Uh, we would have treatment we can offer him, but it  
15 would not be curative at that point. It would be what we call  
16 palliative. It would be to try to get the cancer under  
17 control, to try to keep it from spreading any more than it  
18 already has, and to do that as long as we can, but that

19 eventually we and the patient would know that he'll die from  
20 that cancer.

21 Q Doctor, you've given us your opinion with reasonable  
22 medical certainty as to what you believe his diagnosis was when  
23 he saw you the first time and then after his brain cancer was  
24 detected. Do you have an opinion as to whether or not there is  
25 some unknown site of cancer in his body other than the lung?

26 That was a bad question. Let me redo it.

27 A Yeah. I don't understand really.

28 Q Right.

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1 You've given us what you believe his condition is. Do  
2 you have an opinion as to whether there's some site, some other  
3 site in his body that is metastasizing lung cancer and brain  
4 cancer?

5 A Not anything specifically.

6 Q He was treated with some powerful drugs, correct?

7 A Yes.

8 Q Do you think the treatment was appropriate?

9 A Yes.

10 Q The treatment that he was provided appeared to assist him  
11 with the lung cancer, correct?

12 A Oh, yes. He had a wonderful response.

13 Q Okay. Is there anything about the response that is of  
14 interest to you in evaluating the nature of his cancer?

15 A Well, I guess one thing is sometimes patients with the  
16 more aggressive kind of cancer may have the best response to  
17 the treatment that you give them but would also have the  
18 highest likelihood of it having showered out cells early on  
19 that have metastasized somewhere.

20 Chemotherapy gets throughout the body pretty well, but it  
21 does not cross well into the brain because there is actually  
22 what's referred to as a blood brain barrier that keeps toxic  
23 materials out of your brain. So when God developed us, he did  
24 this so we wouldn't get a lot of toxic things in our brain. It  
25 keeps chemotherapy out of your brain. And that means that if  
cells got into the brain, they may have a chance to grow there  
even though they wouldn't necessarily grow somewhere else.

27 So his brain metastasis could be the result of that. The

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1 issue is could the chemotherapy have sterilized all these other  
2 sites. And we just know by history, from prior data, like I  
3 mentioned, that the likelihood of it doing that is low.

4 Q What do you think his five-year prognosis is?

5 A As I mentioned, even if we take the best of all worlds, I  
6 think at the time of his brain resection his chances of living  
7 five years were less than ten percent. Now it's better than  
8 that I think because he's gone several additional months  
9 without us finding any cancer anywhere else.

10 But like I said, I think the likelihood is still 70  
11 percent that he will show up with recurrent cancer. And  
12 hopefully that's not the case, but unfortunately in my  
13 estimation that's about the risk.

14 Q And do you have an opinion as to whether or not his lung  
15 cancer was caused by smoking?

16 A Yes, I do.

17 Q And your opinion is?

18 A My opinion is that it was caused by smoking.

19 MR. PAUL: Thank you.

20 That's all I have your, Honor.  
21 THE COURT: We'll take a ten-minute recess now. Please  
22 don't discuss the case.  
23 (Recess.)  
24 THE COURT ATTENDANT: Please be seated and come to  
25 order. Court is again in session.  
26 THE COURT: Okay. Mr. Gordon.  
27 MR. GORDON: Thank you, Judge.  
28 Good afternoon, everybody.

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1 CROSS-EXAMINATION  
2 BY HAROLD K. GORDON, Attorney at Law, Counsel on behalf of the  
3 Defendant R.J. REYNOLDS TOBACCO COMPANY:  
4 Q Dr. Gandara, good afternoon.  
5 A Hello.  
6 Q Let me introduce myself. My name is Harold Gordon, and I  
7 represent R.J. Reynolds, one of the defendants in this matter.  
8 I'm going to be asking you a series of questions. If you  
9 don't understand any of my questions, I want you to let me  
10 know. Is that okay?  
11 A Sure.  
12 Q Thank you.  
13 You gave three depositions in this matter; is that  
14 correct?  
15 A That's right.  
16 Q Now, it's not the case, was it, that each of those  
17 depositions were four or six hours long; is that correct?  
18 A It's not the case that each was four to six hours?  
19 Q It's true, isn't it, that the reason we had three  
20 depositions was to accommodate your schedule and that each  
21 deposition session was somewhere in the vicinity of an hour or  
22 two; isn't that right?  
23 A Two were to accommodate my schedule. One was to  
24 accommodate the lawyers' schedule.  
25 Q Fair enough. But each session was no more than a couple  
26 hours; is that fair?  
27 A Uh, I think the last was longer, but I won't argue with  
28 it.

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1 Q But about that? About that duration?  
2 A Okay.  
3 Q If I heard you right on direct during Mr. Paul's  
4 questions, during one of your visits with Mr. Lucier, one of  
5 the periodic occasions where he came to you for an examination  
6 or CT scan or PET scan, he was using -- he was told to use a  
7 bronchodilator; is that correct?  
8 A Yes.  
9 Q And you prescribed a bronchodilator for him; is that  
10 right?  
11 A I don't actually recall whether I prescribed it or  
12 whether someone else had already prescribed it, but he was  
13 prescribed one.  
14 Q You have no idea whether he followed doctor's orders in  
15 using that bronchodilator, do you?  
16 A I think he did for the prescribed period of time. In  
17 other words, that's not a long-term medication. It was used  
18 for this flare of bronchiectasis. So he was to use it for as  
19 long as he had symptoms. In other words, this is an episodic  
20 disorder, like people use bronchodilators for asthma. In other

21 words, some people might need to use the bronchodilator for  
22 asthma every day, some people might have an attack of asthma  
23 and then might be fine for months.

24 Q The purpose of the bronchodilator here was to assist his  
25 breathing during these -- these occasions where he had a  
26 flare-up of adenopathy due to some sort of infection; is that  
27 correct?

28 A Yes.

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1 Q And he may have been prescribed it for the purposes that  
2 you're testifying to, but you can't tell us sitting here today  
3 whether he used it religiously as it was prescribed during  
4 those cases.

5 A I don't know anything about his religion.

6 Q You can't tell us whether he used the bronchodilator as  
7 prescribed.

8 A No, I can't.

9 Q Thank you.

10 Now, you mentioned testing that was done on Mr. Lucier's  
11 brain pathology. Do you recall that?

12 A Yes.

13 Q Now, you're a board certified medical oncologist, correct?

14 A Yes.

15 Q And you're -- you also have a certification in internal  
16 medicine, correct?

17 A Yes.

18 Q But it's fair to say you're not a certified pathologist,  
19 right?

20 A That's correct.

21 Q So you have not reviewed personally any of the pathology  
22 of Mr. Lucier in this case, correct?

23 A No. I have not.

24 Q No, that's correct?

25 A You're correct.

26 Q Okay. And you can't tell us which particular  
27 immunohistochemical stains, if I'm getting that word right,  
28 were actually performed on Mr. Lucier's brain pathology,

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1 correct?

2 A I can. They're in the records here.

3 Q Off the top of your head you can't tell us, correct?

4 A No.

5 Q And you also can't tell us whether the results of the  
6 battery of stains that were done of on his brain pathology were  
7 consistent -- happened to be consistent with any cancers  
8 besides the primary lung cancer, correct?

9 A Uh, no, I can't answer that.

10 Q You can't tell us, for instance, whether the results of  
11 the stains, which may or may not have been consistent with the  
12 primary lung cancer, may not -- may also have been consistent  
13 with a stomach cancer, for instance, right?

14 A Well, you're asking a question -- in other words, they  
15 were consistent with a primary lung cancer. That's how the  
16 diagnosis was made from our UC Davis pathologist.

17 Q I understand that.

18 But the same stain results could have also been  
19 consistent with another cancer; isn't that correct?

20 A I think that's highly unlikely.

21 Q But you're not a pathologist, so you couldn't tell us or

22 give us an expert opinion.  
23 A No, but I'm a medical oncologist. We deal with these  
24 issues every day.  
25 Q Can you tell us in particular whether the battery of  
26 stains and the result of staining that was done on his brain  
27 path was consistent with a germ cell cancer?  
28 A I can't tell you that.

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1 Q Can you tell us whether the battery of stains and the  
2 results of that staining, which ones were negative, which  
3 ones were positive, may not have also been consistent with the  
4 breast cancer?  
5 A I think that's extremely unlikely based on the stains  
6 that were done.  
7 Q But it's possible, isn't it, Doctor?  
8 A I don't think so, but I can't answer that for you  
9 specifically right now. But I would bet money that it is not  
10 consistent with a breast cancer.  
11 Q The -- the flare-ups that have occurred, the recurrence  
12 of hilar adenopathy while you've been seeing Mr. Lucier, you  
13 attributed that to radiation pneumonitis, if I heard you  
14 correctly; is that right?  
15 A Radiation pneumonitis leading to fibrosis leading to  
16 bronchiectasis.  
17 Q And that was the result of some infectious process  
18 causing an enlargement of the lymph nodes; is that right?  
19 A No. No, there are two different issues here.  
20 One is the -- the bronchial tubes getting dilated and  
21 distorted and losing their capacity to clear secretions.  
22 That's the bronchiectasis. The infection then that sets in  
23 because of that process has a reaction to that. When lymph  
24 drains from the lung, it causes a reaction and the lymph nodes  
25 swell up. So that's what we're thinking is happening. But  
26 they're really two different things.  
27 Q But it's true, isn't it, that another infectious process  
28 can also cause adenopathy, cause enlarge lymph nodes; is that

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1 right?  
2 A Sure.  
3 Q Pneumonia can cause adenopathy, correct?  
4 A Yes.  
5 Q Another respiratory infection, such as, bronchitis can  
6 cause adenopathy, right?  
7 A Yes.  
8 Q And that adenopathy could be in the hilar lymph nodes,  
9 correct?  
10 A Yes.  
11 Q It could be in the mediastinal lymph nodes, correct?  
12 A That's right.  
13 Q So if it was the case that Mr. Lucier -- putting aside  
14 his prior radiation treatment, your testimony that that led  
15 to --  
16 THE COURT REPORTER: I'm sorry, Counsel. "...that that  
17 lead to...?"  
18 MR. GORDON: That that led to radiation pneumonitis. I'm  
19 sorry. I'll slow down.  
20 Q (By MR. GORDON) It's also the case, isn't it, Doctor,  
21 that if he had other respiratory infections, such as, pneumonia  
22 or bronchitis, that that could also be the explanation for

23      hilar adenopathy or mediastinal adenopathy, correct?  
24      A       Yes.  
25      Q       If I represented to you, Doctor, that two of the stains  
26      done on Mr. Lucier's brain pathology were cytokeratin-7 and  
27      cytokeratin-20, would that mean anything to you?  
28      A       Just that they're special stains used to differentiate a

1 cancer's histology and possibly the primary site.  
2 Q So you can't tell us how those stains should appear, what  
3 the result of those stains should be for a breast cancer versus  
4 a lung cancer, correct?  
5 A No.  
6 Q And you can't tell us what the results of a CK-7, as it's  
7 called, or a CK-20 stain should be for a stomach cancer versus  
8 a lung cancer, correct?  
9 A No.  
10 Q Have you ever heard of clear cell in cancers, Doctor?  
11 A Yes.  
12 Q And it's rare, isn't it, to have clear cell as an initial  
13 presentation with a lung cancer?  
14 A It's uncommon.  
15 Q It's not a typical finding in a lung cancer; isn't that  
16 right?  
17 A Well, it depends on what the type of the lung cancer is.  
18 Mr. Lucier's initial diagnosis was a large cell  
19 carcinoma. And actually as a result of my deposition wherein  
20 you asked -- or your colleagues asked me this question, I went  
21 back and tried to look at the incidence of clear cell  
22 carcinomas in large cell carcinomas, and it turns out not to be  
23 as rare as I thought.  
24 Q But it's not a prevalent or typical finding with lung  
25 cancer, correct?  
26 A Well, it happened in about ten percent of the large cell  
27 carcinomas in this series. So, again, it's uncommon, but it's  
28 not rare.

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6214

1 Q Now, it's the case, isn't it, Dr. Gandara, that with most  
2 of your patients that you treat the cancer has already been  
3 diagnosed by a pathologist or other treating physician when  
4 they come to see you?

5 A For the majority, yes. But because of what I told you  
6 about our multidisciplinary clinic where we have everybody  
7 together, it's not uncommon at all. Probably 20 percent of my  
8 patients come in with suspected cancer but there's no diagnosis  
9 that's been established yet.

10 Q But with a vast majority of them cancer has already been  
11 determined by a pathologist looking at a pathology specimen or  
12 cytology specimen under a microscope or through some other way  
13 and a determination has been made that there's cancer, correct?

14 A Yes.

15 Q And that was the case here, wasn't it, that is, when  
16 Mr. Lucier first came to see you in April 2000, his cancer had  
17 already been diagnosed by the physicians at the Santa Rosa  
18 facility in June 1999?

19 A That's correct.

20 Q So although you may have reviewed his prior medical  
21 records and films and lab results, you didn't look at his  
22 pathology again and reach another diagnosis of his cancer, it  
23 had already been diagnosed in June 1999, correct?

24 A That's correct.  
25 Q By the way, besides lung cancer, you also treat both  
26 males and females for breast cancer, right?  
27 A Uh, that's correct.  
28 Q And although breast --

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6215

1 A Male breast cancer being very uncommon, of course.  
2 Q Of course.  
3 But although breast cancer is much more prevalent in  
4 women, it is the case, isn't it, that approximately one percent  
5 of breast cancer cases appear in men, right?  
6 A That's right.  
7 Q Now, you don't perform surgery to remove cancer, correct?  
8 A No. I'm not a surgeon.  
9 Q Now, the jury has heard a fair amount about certain types  
10 of examinations that Mr. Lucier has had back in June 1999 in  
11 reaching his cancer diagnosis, such as, a bronchoscopy and a  
12 mediastinoscopy. You're familiar with those exams, right?  
13 A I am.  
14 Q But you do not perform them, correct?  
15 A No, I don't.  
16 Q And it's the case, isn't it, Dr. Gandara, that although  
17 you may review radiology, you're not a certified radiologist,  
18 correct?  
19 A That's correct.  
20 Q Now, there are certain risk factors for lung cancer.  
21 Obviously, smoking is one of them, correct?  
22 A Yes.  
23 Q There are risk factors apart from smoking for lung  
24 cancer; isn't that right?  
25 A Yes.  
26 Q Some percentage of lung cancers appear in non-smokers,  
27 correct?  
28 A That's right.

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6216

1 Q One of the risk factors for cancer -- independent of  
2 smoking -- for lung cancer is a family history of cancer,  
3 correct?  
4 A That's correct. But I should add that that's a pretty --  
5 Q Doctor, you've answered the question.  
6 THE WITNESS: Can I add something, Judge?  
7 THE COURT: Well, we'll proceed with the next question.  
8 Mr. Paul will have an opportunity to ask you a question.  
9 THE WITNESS: All right.  
10 MR. GORDON: Judge, may I approach?  
11 THE COURT: Yes.  
12 Q (By MR. GORDON) Dr. Gandara, I'm going to hand you one  
13 of your medical records, I believe.  
14 MR. GORDON: For the record, this is Defendant's Exhibit  
15 ALC-000903 marked for identification today. This is a medical  
16 record on UC Davis Cancer Center letterhead, dated April 26th,  
17 2000.  
18 (Defendant R.J. Reynolds Exhibit ALC-000903 was marked  
19 for identification.)  
20 Q (By MR. GORDON) Is this one of the records you prepared  
21 in examining Mr. Lucier, Doctor?  
22 A Yes.  
23 Q In fact, is it the case that it appears to be a record  
24 reflecting your first examination of him after he had moved to

25 Sacramento and came to see you?  
26 A That's right.  
27 Q And it's addressed back to Dr. Jack Cavalcant who was his  
28 prior doctor/oncologist in Mesa, Arizona; is that fair?

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6217

1 A That's right.  
2 MR. GORDON: Your Honor, we would move the admission of  
3 this record.  
4 MR. PAUL: No objection.  
5 THE COURT: Received.  
6 (Defendant's Exhibit ALC-000903 was received into  
7 evidence.)

8 MR. GORDON: Can I have the Elmo.  
9 Q (By MR. GORDON) Let me first shrink this for you.  
10 Doctor, this is the record that we're talking about,  
11 correct?

12 A Yes.

13 Q I'm going to ask you to go to the second page for a  
14 second with me, if you would.

15 The top -- the first sentence on the second page, if you  
16 read along with me, says: His family history is significant  
17 for grandmother with Leukemia, a sister and aunt with breast  
18 cancer.

19 Did I read that correctly.

20 A Yes.

21 Q That's the wrong way.

22 Now, it's true, isn't it, Doctor, that a prior family  
23 history, not just of lung cancer but of breast cancer, has been  
24 significantly associated not only with an increased risk of  
25 breast cancer but an independent risk of an increased risk of  
26 lung cancer? Isn't that fair?

27 A I think that's an incredible overstatement of the facts.  
28 There is a very small familial association with lung cancer and

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1 breast cancer that is familial. Ninety-eight percent of lung  
2 cancers are non-familial. To imply that people with a history  
3 of breast cancer are going to get lung cancer is a complete  
4 misinterpretation of the data.

5 MR. GORDON: Judge, may I approach?

6 THE COURT: Yes.

7 Q (By MR. GORDON) Doctor, are you familiar with the  
8 Journal of Cancer Epidemiology Biomarkers and Prevention?

9 A No.

10 Q Do you have any reason to believe it's not a reliable  
11 publication or peer-reviewed publication?

12 A No. I'm sure it is.

13 Q And the title of this article, Doctor, if you go back to  
14 the first page, is Familial Cancer History and Lung Cancer Risk  
15 in the United States: Non-smoking Men and Women. Isn't that  
16 correct?

17 A That's right.

18 Q And it's from the Journal of Cancer Epidemiology  
19 Biomarkers and Prevention. Do you see that?

20 A I see that.

21 Q In the upper left-hand corner, it's from the December  
22 1999 issue. Do you see that?

23 A I see that.

24 MR. GORDON: For identification purposes, this is  
25 Defendants' Exhibit ACX-000152.

26 (Defendant R.J. Reynolds Exhibit ACX-000152 was marked  
27 for identification.)  
28 Q (By MR. GORDON) Would you turn with me to the third page  
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6219

1 of the study, page 1067. Do you see the heading "Discussion"  
2 in the right-hand column?

3 A I see it.

4 Q And the first sentence reads, doesn't it --

5 MR. PAUL: I'm going to object. Lack of foundation.

6 THE COURT: Sustained.

7 MR. GORDON: Judge, can we approach?

8 THE COURT: Yes.

9 (The following bench conference was then had.)

10 MR. GORDON: I thought we had a foundation. It's a  
11 reliable peer-review journal. This article I'm using not to  
12 move into admission but simply for impeachment purposes, and I  
13 was going to ask him about his view of a particular statement  
14 in here.

15 MR. PAUL: Number one, he said he's never even heard of  
16 the journal. Number two, it's an epidemiology journal. And  
17 number three, he's obviously never read this article. So  
18 there's no foundation.

19 THE COURT: You haven't provided a foundation. He did  
20 say -- you know, he conceded that it's reliable, but he did  
21 that in the context of having denied knowing what it's all  
22 about. So unless you establish a foundation that he  
23 specifically regards this as a reliable authority, or some  
24 other basis for a foundation, it's not -- it can't be  
25 considered over an objection under Evidence Code Section 721.

26 MR. GORDON: All right. I'll move on.

27 (Bench conference concluded.)

28 THE COURT: Okay. Are you ready, Tom?

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6220

1 We're not going to take a break, but we're going to  
2 change reporters here.

3 (Change of reporters.)

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6221

1 PAGE 6221 WAS BLOCK NUMBERED FOR TRANSCRIPTION PURPOSES.  
2 (NOTHING OMITTED.)  
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6222 1 TUESDAY, DECEMBER 10, 2002

2 (Afternoon Session Continued)

3 ---oOo---

4 THE COURT: Okay.

5 MR. GORDON: All set?

6 Q. All right. Dr. Gandara, I believe you testified that  
7 when you first took on Mr. Lucier as a patient in April of  
8 2000, you reviewed his prior records, his prior cancer  
9 treatment, correct?

10 A. Yeah.

11 Q. And that would include the radiology in connection  
12 with his cancer diagnosis in June, 1999, I would assume,  
13 correct?

14 A. I think we had that, yeah.

15 Q. And you're aware, are you not, that the x-ray films  
16 and CT scans in June, 1999, the reports related to those  
17 films did not reveal, or report a mass in a lung lobe, as  
18 opposed to a hilar mass; is that correct?

19 A. That's incorrect. The hilum is in the lung. It is  
20 part of the lung.

21 Q. But it's true, isn't it, that the radiologist who  
22 prepared the reports after examining the films did not  
23 report in those records a lung mass in lung lobe, correct?

24 A. They did not report a separate lung mass from the  
25 hilar mass.

26 Q. They referred to a hilar mass, correct?

27 A. That's correct.

28 Q. And they referred to adenopathy in the mediastinum,  
6223  
1 correct?

2 A. That's right.

3 Q. No lung mass, correct?

4 A. I just explained that for you.

5 Q. But they did not report a lung mass, as opposed to a  
6 hilar mass in a mediastinal adenopathy, correct?

7 A. I can have them read back my testimony, but what I  
8 said was there was no lung mass separate from the hilar  
9 mass.

10 MR. GORDON: Move to strike, Judge.

11 THE COURT: Denied. Next question.

12 Q. BY MR. GORDON: On the face of the CT report and  
13 x-ray, they refer to a hilar mass; is that correct?

14 A. That's correct.

15 Q. Now you're aware from review of the prior records  
16 that the results of Mr. Lucier's bronchoscopy were negative;  
17 is that correct?

18 A. That is correct.

19 Q. The pathology and cytology that were obtained upon  
20 examination by a pathologist were negative to any cancer,  
21 right?

22 A. That's right.

23 Q. And then Mr. Lucier was given a mediastinoscopy,  
24 correct?

25 A. Yes.

26 Q. And the results of the mediastinoscopy revealed  
27 cancer based on a biopsy of Mr. Lucier's pretracheal lymph  
28 nodes; is that correct?

6224  
1 A. That's correct.

2 Q. And the pretracheal lymph nodes are nodes in front of  
3 trachea, pretracheal, right?

4 A. That's correct.

5 Q. No biopsy was obtained of Mr. Lucier's lung tissue  
6 during the mediastinoscopy; is that correct?

7 A. That's right.

8 Q. And no biopsy was obtained of the hilar mass that was  
9 noticed on the CT's or x-ray; is that correct?

10 A. That's correct.

11 Q. Now, you talked with Mr. Paul a little bit on direct  
12 about the staging of lung cancer; do you recall that  
13 testimony?

14 A. Yes.

15 Q. And as I understand it, cancer, including lung  
16 cancer, is staged or ranked on, among other factors, the  
17 extent to which it has spread to lymph nodes in the area of  
18 cancer; is that fair?

19 A. That's correct.

20 Q. And I believe you told us that Mr. Lucier's cancer  
21 was initially staged as stage 3; was that correct?

22 A. That's correct.

23 MR. GORDON: Judge, may I approach.

24 THE COURT: Yes.

25 Q. BY MR. GORDON: Doctor, I've just handed you a  
26 September 21st, 1999 letter from a doctor Ronald Van Roy to  
27 Doctors Jaffee and Mehta. Do you see that?

28 A. I see it.

6225

1 Q. Dated September 21st, 1999. Do you see that?

2 A. Yes.

3 Q. And the "re" line reads, Laurence Lucier, correct?

4 The "re" line on the top of the letter?

5 A. Yes.

6 Q. And, for the record, this is Defendant's Exhibit  
7 marked for identification ALC-000048.2.

8 Judge, we would move the admission of this record.

9 MR. PAUL: I have no objection.

10 THE COURT: Received.

11 (Defendant RJR's Exhibit ALC-000048.2, Letter from  
12 Dr. Van Roy to Drs. Jaffee and Mehta, was Marked for  
13 Identification received In Evidence.)

14 MR. GORDON: The Elmo?

15 Q. Dr. Gandara, this is the record that I just handed  
16 you, right?

17 A. Yes.

18 Q. And Dr. Van Roy was Mr. Lucier's radiation  
19 oncologist, correct?

20 A. I actually don't remember who was the medical and who  
21 was the radiation. I --

22 Yes, it says radiation oncology at the top.

23 Q. And he writes in this letter, among other things, if  
24 you look at the highlighted sentence, that, again, 12 months

25 is frequently average survival for carcinoma of the lungs,

26 stage 3; do you see that?

27 A. I see it.

28 Q. And this was in September, 1999, correct?

6226

1 A. Yes.

2 Q. And it's true, isn't it, that when Mr. Lucier was  
3 later diagnosed with a solitary metastasis to his brain,  
4 that that changed his status to a stage 4 cancer; isn't that  
5 correct?

6 A. That's correct.

7 Q. And the staging hereof, whether it's a stage 3 or a  
8 stage 4, is predicated on the assumption that his cancer  
9 initially was a primary lung cancer; isn't that correct?

10 A. That's correct.

11 Q. And then Mr. Lucier underwent chemotherapy and  
12 radiation treatment, correct?

13 A. Yes.

14 Q. The chemotherapy drugs he was treated with were  
15 Paclitaxel and carboplatin; is that correct?

16 A. Yes.

17 Q. And Paclitaxel and carboplatin, as you alluded to  
18 during your direct testimony, was a broad-based  
19 antineoplastic; is that correct?

20 A. That's correct.

21 Q. A part from the blood/brain barrier and perhaps the  
22 sexual organs, they would treat the body otherwise  
23 throughout for cancer, correct?

24 A. I don't understand your question.

25 Q. When those drugs are administered, other than the  
26 brain, and as I understand it the sexual organs, they won't  
27 just treat cancer where it's found; they'll treat cancer  
28 that may exist elsewhere throughout the body?

1 A. What kind of cancer are you talking about?

2 Q. Cancer that may be similar to the cancer that had  
3 been diagnosed?

4 A. Well, these are not drugs that were used for all  
5 cancers. I don't understand the basis for your question.

6 Q. Well, the Taxol, Taxol is not just given for lung  
7 cancer, correct?

8 A. There are only two cancers where this is standard  
9 therapy, non-small-cell lung cancer and ovarian cancer. In  
10 other words, these are not broad-based; they are not used as  
11 a broad-based spectrum against all sorts of cancers.

12 MR. GORDON: Judge, may I approach.

13 THE COURT: Yes.

14 Q. BY MR. GORDON: Dr. Gandara, are you familiar with a  
15 publication regarding chemotherapy and other drugs known as  
16 the USP DI?

17 A. Yes.

18 Q. And the USP DI is a standard reference source as  
19 to -- For what cancers, different chemotherapy drugs are  
20 indicated, correct?

21 A. Um, these are not necessarily approved -- These are  
22 used as where the drugs had been shown to be active.

23 Q. Okay. But the USP DI guide is one source relied upon  
24 by oncologists and other doctors to -- For what certain  
25 drugs are indicated, what diseases or cancers; is that  
26 correct?

27 A. That's right.

28 Q. And they're considered a reliable source for that  
6228 1 sort of information, correct?

2 A. Yes.

3 Q. Let me ask you first about -- Well, I just handed

4 you two excerpts from the USP DI, correct?

5 A. Yes.

6 MR. GORDON: And I've given copies to Mr. Paul.

7 (A USP DI, Drug Information for the Health Care

8 Professional was Marked as Defendant RJR's Exhibit

9 ACX-000178 For Identification.)

10 Q. BY MR. GORDON: Let me ask you first about the one  
11 that addresses Taxol, which has been marked today for  
12 identification as Defendant's Exhibit ACX-000178.

13 Do you have that particular excerpt?

14 A. I have it

15 Q. And if you could turn to the third page of this  
16 excerpt, it talks about a drug at the top of the page, a  
17 page called, Paclitaxel, P-A-C-L-I-T-A-X-E-L.

18 Are you with me, Dr. Gandara?

19 A. Yes.

20 Q. And Paclitaxel, the common brand name to that  
21 chemotherapy drug is Taxol, right?

22 A. That's right.

23 Q. That's one of the chemotherapy drugs that Mr. Lucier  
24 received, right?

25 A. That's right.

26 Q. And next to the Paclitaxel heading it says  
27 "systemic", correct?

28 A. Yes.

6229 1 Q. And then, underneath that, it says category,

2 "antineoplastic", meaning a drug given to combat cancer,  
3 correct?

4 A. Yes.

5 Q. And then it has the heading, indications, meaning the  
6 particular types of cancers that this drug can be  
7 administered for. Do you see that?

8 A. I see that.

9 Q. And it has accepted cancers, meaning cancers that

10 Taxol may be prescribed for below that. Do you see that?

11 A. I see that.

12 Q. And among the cancers that Taxol is indicated for, it

13 can be used for, include breast cancer, correct?

14 A. Yes.

15 Q. Right?

16 And non-small-cells --

17 A. This shows all cancers where this drug has activity

18 in any setting. This is like apples and oranges; it is very

19 naive to --

20 MR. GORDON: Move to strike, Judge.

21 THE COURT: It's stricken.

22 Just listen to the question --

23 Q. BY MR. GORDON: Isn't it true that one indicated

24 cancer here is breast cancer?

25 A. Yes.

26 Q. Non-small-cell lung cancer?

27 A. Yes.

28 Q. Is one of the indicated cancers for which Paclitaxel  
6230

1 is given here prostate cancer; do you see that?

2 A. Yes.

3 Q. And another cancer that Taxol is treated for here is

4 gastric or stomach cancer; do you see that?

5 A. Yes.

6 Q. And below gastric cancer another type of cancer that

7 Taxol has been indicated for, for usage is called, "Cancer,

8 unknown primary site." Do you see that?

9 A. I see that.

10 Q. And then below that in other cancer that Taxol has

11 been indicated for, for treatment is germ-cell or testicular  
12 cancer; do you see that?

13 A. Yes, I think you can't use the term "indication" here  
14 we're not talking about an indication --

15 MR. GORDON: Judge, move to strike.

16 THE COURT: Denied. Next question.

17 Please just respond directly to the question.

18 Mr. Paul will be able to respond to you later.

19 THE WITNESS: I want to be able to make my answer  
20 mean meaningful.

21 THE COURT: I understand. But we have to proceed in  
22 a manner consistent with the rules here, and I just ask you  
23 to abide by them, please.

24 THE WITNESS: Okay.

25 THE COURT: Mr. Gordon.

26 MR. GORDON: Thank you, Judge.

27 Q. I want to ask you, Doctor, about the same excerpt for  
28 carboplatin, do you have that?

6231  
1 A. I have it.

2 MR. GORDON: For the record, this has been marked for  
3 identification as Defendant's Exhibit ACX-000179.

4 (Drug Information for the Health-Care Professional  
5 was Marked as Defendant RJR's Exhibit ACX-000179 For  
6 Identification.)

7 Q. BY MR. GORDON: And on the third page of that  
8 document it lists carboplatin; are you with me, Dr. Gandara?

9 A. I'm with you.

10 Q. And it has carboplatin systemic; do you see that?

11 A. Yes.

12 Q. This is one of the chemotherapy drugs that Mr. Lucier  
13 received, correct?

14 A. He did.

15 Q. And it also has indicated uses listed under the  
16 heading "Indication". Do you see that?

17 A. Yes.

18 Q. And it lists breast cancer, correct?

19 A. Yes.

20 Q. Non-small-cell lung cancer right?

21 A. Yes.

22 Q. Testicular cancer, correct?

23 A. Yes.

24 Q. And then below that, as part of a combination regimen  
25 with Paclitaxel it also reveals an indicated usage of  
26 first-line treatment of cancer of unknown primary site.

27 Do you see that?

28 A. I see that.

6232

1 Q. Thank you.

2 MR. GORDON: Judge, may I approach.

3 THE COURT: Yes.

4 Q. BY MR. GORDON: Dr. Gandara, I am going to give you  
5 some more papers.

6 Dr. Gandara, it's correct, isn't it, that what I've  
7 just given are you two more letters regarding Mr. Lucier on  
8 Redwood Regional Oncology Center letterhead, correct?

9 A. Yes, you have.

10 Q. And that's where Mr. Lucier was treated for his  
11 cancer in June, 1999, fair enough?

12 A. Yes.

13 Q. For the record, one letter is dated June 30th, 1999  
14 correct?

15 A. Yes.

16 Q. And one letter is dated September 22nd, 1999,  
17 correct?

18 A. Yes.

19 MR. GORDON: The June 30th, 1999 letter has been  
20 marked for identification as Defendant's Exhibit ACX-000151,  
21 and the September 22nd, 1999 letter has been marked for  
22 identification for identification as ALC-000048.3.

23 Judge, we move the admission of these documents.

24 THE COURT: Objection?

25 MR. PAUL: No objection.

26 THE COURT: Received.

27 ///////////////

28 /////////////////

6233

1 (Defendant RJR's Exhibit ACX-000151, 6-30-99 Letter

2 from Jaffee to Mehta and Chung was Marked for  
3 Identification and was received In Evidence.)

4 (Defendant RJR's Exhibit ALC-000048.3, 9-22-99 Letter

5 from Jaffee to Van Roy and Mehta was Marked for  
6 Identification and was received In Evidence.)

7 MR. GORDON: The Elmo on?

8 Q. Doctor, this is one of the letters that we're  
9 discussing, correct?

10 A. Yes.

11 Q. And it's from Dr. Julius Jaffee to Doctors Mehta and  
12 Chung; do you see that?

13 A. Yes.

14 Q. Do you understand from your review of Mr. Lucier's  
15 prior records that there Jaffee was the oncologist who  
16 treated him at this time?

17 A. Yes.

18 Q. And if you look at the last paragraph it reads:

19 "He will be on Lovenox, 60 milligrams, b.i.d.  
20 continue Coumadin at ten milligrams a day, and returns next  
21 week to start weekly carboplatin and Taxol radiation

22 therapy."

23 Do you see that?

24 A. I see that.

25 Q. So it's fair to say that Mr. Lucier's radiation and

26 chemotherapy commenced sometime in early June, 1999,

27 correct?

28 A. Yes.

6234

1 Q. This is the second document that I handed to you,

2 correct?

3 A. Yes.

4 Q. And if we go to the second page, this is also from

5 Dr. Jaffee, his oncologist at that time; fair enough?

6 A. Correct.

7 Q. Re Laurence Lucier. And it's to Drs. Van Roy and

8 Mehta, correct?

9 A. Yes.

10 Q. I want to read to you some of the highlighted

11 language here, and, Tom, I'll go as solemnly as possible.

12 "Dear Doctors, Lawrence Lucier was in the

13 office today for a follow-up visit. He looks and

14 feels extremely well. His last CAT scan showed

15 disappearance of his tumor and the lymphadenopathy

16 has markedly regressed. I explained to him that

17 the lymphadenopathy may involve more than the

18 presence of tumor and could be secondary

19 inflammation, and the main result of the

20 disappearance of his primary hilar tumor was of

21 greatest significance."

22 Do you see that?

23 A. I see it.

24 Q. So it's fair to say at this time, based on the

25 treatment that he was receiving, or for whatever reason, the  
26 hilar mass that had been detected in June, 1999, on the  
27 x-ray and CT scan had, according to Dr. Jaffee, resolved  
28 itself; is that correct?

6235

1 A. That's correct.

2 Q. He has had one of three conclusion doses of  
3 carboplatin. And then he goes on to say: "I certainly  
4 think that his prognosis was a lot better than it was at the  
5 outset. Although one doesn't usually speak of cure in his  
6 situation, I think that the expectation of cure is there.  
7 Of course, statistically, that may not be possible."

8 Correct?

9 A. Correct.

10 Q. Do you see that?

11 So it's fair to say, doctor, that within about 60  
12 days of Mr. Lucier first getting chemotherapy and radiation  
13 treatment the hilar mass that had been previously detected  
14 had resolved itself?

15 A. No, he had not been receiving systemic therapy with  
16 radiation.

17 Q. Answer my question. Is it fair to say that, based on  
18 his treatment, that within 60 days of when he started that  
19 treatment, his hilar mass had resolved itself?

20 A. That statement is correct.

21 MR. GORDON: Judge, may I approach.

22 THE COURT: Yes.

23 Q. BY MR. GORDON: Dr. Gandara, this is a radiology  
24 report from the University, U.C. Davis Medical Center, dated  
25 September 16th, 2002, correct?

26 A. Yes.

27 Q. And it reflects a CT of the chest of Mr. Lucier  
28 correct?

1 A. Yes.

2 MR. GORDON: Judge, we would move the admission of  
3 this document.

4 MR. PAUL: No objection.

5 THE COURT: Received.

6 (Defendant RJR's Exhibit ACX-000034, Dr. Van Raalte's  
7 Radiology Report was Marked for Identification and was  
8 received In Evidence.)

9 Q. BY MR. GORDON: Doctor, this is the record that we  
10 just introduced, correct?

11 A. That's right.

12 Q. And the finding in this CT scan -- By the way, this  
13 is the most recent chest CT that Mr. Lucier has had?

14 A. It is.

15 Q. Is that correct? Is that right?

16 A. I said it is.

17 Q. Okay. I'm sorry; I didn't hear your answer.

18 And the finding was no evidence of cancer recurrence;  
19 is that correct?

20 A. That's correct.

21 Q. And you also mention PET scans that Mr. Lucier has  
22 been given right?

23 A. Right, yes.

24 Q. And the most recent PET scan, like the most current  
25 C.T. scans that we just discussed, reflect no cancer  
26 recurrence; is that correct?

27 A. That's right.

28 Q. Now, as we discussed a few minutes earlier,  
6237  
1 adenopathy or enlarged lymph nodes can be caused by a number  
2 of things, such as the size of metastatic cancer, and  
3 infection process; right?

4 A. That's right.

5 Q. And we also discussed how during the procedures that  
6 Mr. Lucier had in June of 1999, the hilar mass that had been  
7 seen on x-rays and CT scans was never biopsied, correct?

8 A. That's right.

9 THE COURT: We'll take a ten-minute recess now.

10 Please do not discuss the case.

11 (The mid-afternoon recess was taken at 3:40 pm.)

12 THE COURT: Okay, Mr. Gordon.

13 MR. GORDON: Thanks, Judge.

14 Judge, we would move the admission of these two  
15 chemotherapist guides that we were discussing earlier.

16 MR. PAUL: They're about ten pages long, I haven't  
17 had a chance --

18 MR. GORDON: We can defer that, after Mr. Paul has a  
19 chance to review them.

20 THE COURT: Okay.

21 MR. GORDON: We request that --

22 THE COURT: I'll reserve ruling on that.

23 MR. GORDON: Thank you, your Honor.

24 MR. GORDON: May I approach, Judge.

25 THE COURT: Yes.

26 Q. BY MR. GORDON: Dr. Gandara, some more paper.

27 Dr. Gandara, I've given you two CT scan reports of  
28 Mr. Lucier from earlier this year.

6238 1 The first one from February of this year has been  
2 marked for identification as Defendant's Exhibit ACX-000185.

3 The second dated March 2nd -- March 5 of this year.

4 It's been marked today for identification as Defendant's  
5 Exhibit ALC-000040.13.

6 Dr. Gandara, I want to ask you about the February,  
7 2002, chest CT report first.

8           That's another U.C. Davis Department of Radiology

9 report; do you see that?

10 A.       I see that.

11 Q.       And refers to a CT that was requested by yourself, in  
12 fact. Do you see that?

13 A.       Yes.

14 Q.       And involves Mr. Lucier, correct?

15 A.       Yes.

16 Q.       And in the impressions section, No. 3, it says, "No  
17 evidence of pulmonary nodules or masses." Do you see that?

18 A.       Yes.

19           MR. GORDON: We would move the admission of this  
20 document.

21           MR. PAUL: No objection.

22           THE COURT: Received.

23           (Defendant RJR's Exhibit ACX-000185, UCD Report of  
24 Exam date 2-11-02, was Marked for Identification and was  
25 received In Evidence.)

26           (Defendant RJR's Exhibit ALC-000040.13, March 5  
27 Report of CT of the Chest was Marked for Identification and  
28 was received In Evidence.)

6239  
1 Q.       BY MR. GORDON: On the second document I handed you,  
2 that's a U.C. Davis Department of Radiology CT report, just  
3 about a month later, in March, 2002. Isn't that correct?

4 A.       That's correct.

5 Q.       And this CT does find something, doesn't it, doctor?

6 A.       It does.

7 Q.       And I'm going to refer you to a sentence that's in  
8 the middle of the last paragraph on the first page, that  
9 begins, "The mass is irregular." Do you see that?

10 A.       Yes.

11 Q. And that's -- That sentence reads, "The mass is  
12 irregular and difficult to measure, but probably is roughly  
13 three by three centimeters as measured on image five, colon,  
14 61."

15 Do you see that?

16 A. Yes.

17 Q. Is this one of the subsequent flare-ups in the hilar  
18 area, of the hilar mass that you referred to earlier?

19 A. (No Response)

20 Q. In Mr. Lucier?

21 A. This is a long major fissure in the right middle  
22 lobe, so it's not exactly in the hilum; it's more extensive  
23 than that.

24 Q. But it's in the hilar area, correct?

25 A. No. I just explained it's more extensive than the  
26 hilar area.

27 Q. And it's around the same size, is it not, as the mass  
28 that was detected in Mr. Lucier in June, 1999, correct?

6240 1 A. Yes.

2 Q. Mr. Lucier received some antibiotics around the time  
3 of this flare-up, of -- The mass, correct?

4 A. Yes.

5 Q. He received Zithromax, correct?

6 A. I believe that's correct.

7 Q. And no -- No cancer was found, notwithstanding the  
8 CT findings at this time in March, 2002, correct?

9 A. I'm not sure what you mean.

10 Q. There was no diagnosis of cancer made at this time --

11 A. No.

12 Q. -- By a pathologist, correct?

13 A. There was no biopsy taken.

14 Q. Ask also no cancer was found, correct?

15 A. There was no attempt to look for cancer, no.

16 Q. Are you ever aware of a finding of cancer at around  
17 this time?

18 A. No.

19 MR. GORDON: Judge, may I approach.

20 THE COURT: Yes.

21 Q. Doctor, this is another CT scan shortly after that  
22 March, 2002 CT scan. This is may, 2002. I -- Requested by  
23 you, a CT scan of Mr. Lucier's chest; do you see that?

24 A. Yes, I do.

25 MR. GORDON: This has been marked for identification  
26 as Defendant's Exhibit ALC-00040.18.

27 We would move the admission of this document.

28 MR. PAUL: No objection.

6241 1 THE COURT: Okay, received.

2 MR. GORDON: We would move the admission of the  
3 March, 2002 document. I'm not sure I did that.

4 MR. PAUL: No objection.

5 THE COURT: Received.

6 Did you get that?

7 THE CLERK: Yes.

8 (Defendant RJR's Exhibit ALC-00040.18, Report of CT  
9 of the Chest, was Marked for Identification and was received  
10 In Evidence.)

11 Q. BY MR. GORDON: And if you look at the impressions  
12 section of this May, 2002 CT report, it reflects there's  
13 been a complete resolution of hilar mass that was previously  
14 noted in the March, 2002 chest x-ray, correct? Chest CT  
15 correct?

16 A. Yes.

17 Q. So that whatever that mass was, it went away by the

18 time of this CT scan in May, 2002, correct?

19 A. Yes.

20 Q. Ask no cancer was ever diagnosed at that time,  
21 correct?

22 A. No.

23 Q. And Mr. Lucier received antibiotics at that time,  
24 correct?

25 A. Yes, that's correct.

26 Q. By the way, he also received antibiotics back in  
27 June, 1999, correct?

28 A. I think when he initially came in, part of the

6242  
1 differential diagnosis was pneumonia, so he may have  
2 received antibiotics then.

3 Q. Now, Mr. Lucier's brain metastasis that was first  
4 diagnosed in January, 2001, was resected, and so far that  
5 treatment appears to have been successful, correct?

6 A. That's correct.

7 Q. No cancer has been, for instance, diagnosed in his  
8 brain or his lung, thankfully, since he's been under your  
9 care, correct?

10 A. No. His brain metastatic occurred while he was under  
11 my care.

12 Q. Right. But apart from that -- And following that,  
13 no subsequent cancer has been diagnosed in his brain,  
14 correct?

15 A. Yes, following that, there's been no further cancer.

16 Q. And no subsequent cancer has been diagnosed in his  
17 lung; is that correct?

18 A. That's correct.

19 Q. You don't have any plans at the current time, do you,  
20 doctor, to give Mr. Lucier any chemotherapy, correct?

21 A. No.

22 Q. And you have no plans at the current time, I take it,  
23 to give him any radiation treatment; is that correct?

24 A. That's correct.

25 Q. There's no need for that, is there? There's no  
26 cancer to treat now, correct?

27 A. No, there is no clinically evident cancer to treat at  
28 this time.

6243

1 Q. Now, you have testified on direct about Mr. Lucier's  
2 current prognosis, correct?

3 A. Yes.

4 Q. And you gave statistics as to the likelihood that he  
5 will experience a cancer reoccurrence; is that correct?

6 A. That's correct.

7 Q. But apart from general statistics, you can't say  
8 sitting here today exactly when any cancer may recur,  
9 correct?

10 A. That's correct.

11 Q. It could be a matter of years, correct?

12 A. It could be.

13 Q. And -- I mean, hopefully there won't be a recurrence  
14 of cancer in Mr. Lucier, but if there is, you can't tell  
15 exactly where it may recur, correct?

16 A. That is correct.

17 Q. I believe, if I heard you right on direct, the  
18 testimony you gave about Mr. Lucier was that he had a  
19 70-percent chance of a recurrence within the next five  
20 years; is that correct?

21 A. Yes. That's my best estimate at this time.

22 Q. But at the time of your deposition in this matter,  
23 your testimony was that that chance of recurrence was at its  
24 peak only up to March of this year, correct.

25 A. (No Response)

26 Q. Your deposition was in November, 2001.

27 Your testimony at that time was that he had an

28 80-percent chance of recurrence, versus your 70-percent

6244

1 chance today. But it was your testimony that back -- That

2 possible event of a recurrence peaked in March, 2002,

3 correct?

4 A. I think what I said was, his greatest chance of

5 recurrence is within the first one year.

6 MR. GORDON: Mr. Paul, I'm going to show page 228.

7 (A brief discussion was held off the record between

8 Mr. Gordon and Mr. Paul.)

9 MR. GORDON: Melanie, can we play this, 228 of Dr.

10 Gandara's November 26th, 2001 deposition, lines three

11 through 12.

12 (The above-describe video was played as follows:)

13 Q. BY MR. BROWN: The largest percent of that

14 80 percent who have a reoccurrence of the lung

15 cancer -- And did you say that would be a

16 metastasis?

17 MR. MURPHY: Objection to the form.

18 Q. BY MR. BROWN: Eighty percent will have a

19 metastasis?

20 A. Eighty percent would have a metastasis.

21 Q. And right now, between now and, let's say,

22 March, are we in the highest risk of that 80

23 percent?

24 A. Yes.

25 Q. BY MR. GORDON: Dr. Gandara, that was your testimony

26 in that deposition, correct?

27 A. Yes.

28 Q. Now, you've been seeing Mr. Lucier for an examination

6245

1 or checkup about once every three months or so; is that

2 fair?

3 A. That's right.

4 Q. And during these examinations, besides perhaps

5 ordering some radiology, you also do physical exam; is that

6 right?

7 A. That's correct.

8 Q. And you'll find out how he's been doing, correct?

9 A. Yes.

10 Q. And that -- And as -- As of the time of your, the

11 latest exam that you had conducted, in -- Before your

12 November, 2001 deposition, you had found that Mr. Lucier's

13 lungs were clear, correct?

14 A. Yes.

15 Q. He had a normal cardiac exam, correct?

16 A. Yes.

17 Q. And he had a normal neurologic exam, correct?

18 A. That's correct.

19 Q. And it's fair to say that you have never referred

20 Mr. Lucier to a neurologist for any testing for memory loss,

21 correct?

22 A. No. As you know from my note, what I recommended was

23 that if his memory loss persisted or got worse, that I would

24 refer him for psychometric testing.

25 Q. But he never -- He never did see a neurologist for

26 memory loss, correct?

27 A. He has not yet.

28 Q. And you never prescribed any medication for memory

6246

1 loss, correct?

2 A. No.

3 Q. And as far as his current condition, at least at the

4 time of your deposition, Mr. Lucier was periodically  
5 fatigued, but he was moving around on his own two feet? Is  
6 that correct?

7 A. That's right.

8 Q. By the way, it's true, isn't it, that in August of  
9 this year, just several months ago, Mr. Lucier had an  
10 appendectomy, had his appendix taken out; isn't that  
11 correct?

12 A. I think that's about the right time, yes.

13 Q. And that's a procedure that requires that the patient  
14 be put under general anesthesia, correct?

15 A. Yes, I think -- I don't know if he had a  
16 laparoscopic with a local or a general, actually. But, yes,  
17 generally, general anesthesia.

18 Q. Generally, you're put under "general anesthesia" when  
19 your appendix is removed, correct?

20 A. Yes.

21 Q. And the appendectomy was a success, thankfully?

22 A. Yes.

23 Q. And I take it no additional cancer was found at that  
24 time, correct?

25 A. That's correct.

26 Q. And Mr. Lucier is fine, correct?

27 A. I don't understand that.

28 Q. As result of his appendectomy, which went fine --

6247 1 A. Yes, he's had no more appendicitis.

2 Q. Okay. And at the time of your last deposition in  
3 this matter, the only medication that you knew of that  
4 Mr. Lucier was taking at that time was occasional over-the-  
5 counter pain medication, such as Tylenol, correct?

6 A. That's correct.

7 Q. And it's also true, isn't it, doctor, that you

8 recommended to Mr. Lucier that he begin an exercise program,

9 correct?

10 A. I think actually Mr. Lucier brought it up to me, and  
11 I concurred that he do that.

12 Q. And I take it that this was some sort of physical  
13 exercise program, correct?

14 A. Yes.

15 Q. You mentioned, if I heard you right, doctor,

16 large-cell carcinoma during your testimony, correct?

17 A. That's right.

18 Q. You yourself have not made a diagnosis of large-cell  
19 cancer in Mr. Lucier, correct?

20 A. Well, typically, although pathologists will  
21 differentiate non-small-cell lung cancer into different  
22 types, the biologic behavior and the treatment is very  
23 similar. So we actually do not even further characterize  
24 large-cell versus squamous versus adenocarcinoma on any our  
25 treatments.

26 Q. In fact, for treatment purposes, it's generally the  
27 case that the classification that's most important to you is  
28 whether the lung cancer is small-cell or large-cell; is that  
6248  
1 correct?

2 A. That's correct.

3 Q. As far as which treatment is most appropriate for a  
4 patient, is that correct?

5 A. That's correct.

6 Q. So the particular histology for a patient beyond  
7 that -- The jury has been hearing a lot over the past  
8 several days about different types of histology in lung  
9 cancer -- But for treatment purposes, it's really most  
10 important whether it's non-small cell or not, correct?

11 A. That's right.

12 Q. By the way, have you seen any notations in Mr.

13 Lucier's immediate record about a signet-ring-cell histology  
14 connected in his pathology?

15 A. Not that I can recall.

16 Q. And I take it as a non-pathologist, you haven't  
17 reviewed any pathology studies of signet-ring-cell cancer;  
18 is that correct?

19 A. You mean in my career?

20 Q. In your practice?

21 A. Sure, I've looked at studies of signet-ring carcinoma  
22 in the past, but not in relationship to this case or  
23 anything that would be pertinent to this case.

24 Q. Okay. Good.

25 Since you started seeing patients -- I assume at  
26 some point, you graduated medical school, you got your  
27 medical degree, and at some point shortly thereafter, you  
28 started seeing patients, is that correct, even if you were  
6249  
1 still training in some fashion?

2 A. That's correct.

3 Q. And it's true, isn't it, that throughout the time  
4 that you have seen patients that you can't recall a time  
5 that, when you learned a patient was a smoker, you didn't  
6 discuss their smoking with them, correct?

7 A. It's hard to remember back that far, but my  
8 recollection is probably by the time, at least, that I had  
9 gotten through most of my training, that would be true.

10 Q. So from that point on, it's true, isn't it, that if  
11 you learned a patient was a smoker, your typical practice  
12 would be that you would discuss the risks of smoking with  
13 them, correct?

14 A. That's right.

15 Q. And when you encounter a patient like Mr. Lucier who  
16 you find out is a smoker, you typically counsel them to try  
17 and stop smoking; is that correct?

18 A. That's correct.

19 Q. And I take it, it's also true, that you have never  
20 told any of your patients that you have learned are smokers  
21 that they cannot -- They cannot quit smoking, if there's  
22 some reason that makes them simply unable to quit, correct?

23 A. I've told patients that they may be particular -- It  
24 may be particularly difficult for them to quit, compared to  
25 the average smoker.

26 Q. But not impossible, correct?

27 A. Um, that gets into this area you didn't want to talk  
28 about earlier, of addiction and nicotine dependence; there's  
6250  
1 a genetic manifestation that would cause it.

2 Q. Doctor, did you counsel Mr. Lucier at any time that  
3 it was simply impossible for him to quit smoking?

4 A. I did not.

5 Q. In fact, you offered Mr. Lucier some assistance in  
6 quitting, didn't you?

7 A. Yes, I did.

8 Q. You told him that U.C. Davis had a program to help  
9 smokers quit, correct?

10 A. Correct.

11 Q. And as far as you know, at least as of the time of  
12 your deposition in this matter, he chose not to pursue that  
13 program, correct?

14 A. I don't think I can agree with that statement.

15 Q. But you referred him to a program to try to help him  
16 quit smoking, correct?

17 A. I did.

18 MR. GORDON: I have no further questions, your Honor.

19 THE COURT: Miss Fey.

20 MS. FEY: Your Honor, Philip Morris has no questions.

21 THE COURT: Mr. Paul.

22 REDIRECT EXAMINATION

23 BY MR. PAUL, Counsel for the Plaintiff:

24 Q. Doctor, does Mr. Lucier have lung cancer that  
25 metastasized to the mediastinum that metastasized to his  
26 brain?

27 A. He has a classic case of lung cancer.

28 Q. Classic?

6251  
1 A. Classic.

2 Q. What do you mean, "classic"?

3 A. The clinical pathologic, radiographic criteria are  
4 all there.

5 Q. Come on by, Aaron.

6 Does he have breast cancer?

7 A. No way.

8 Q. You were asked about these drugs, Taxol and  
9 carboplatin, correct?

10 A. Yes.

11 Q. You were shown these exhibits, talking about Taxol  
12 and carboplatin, correct?

13 A. Correct.

14 Q. And if you look at these exhibits, these drugs cure  
15 every cancer known to man, right?

16 A. You would think so from the way the questions were  
17 directed. It's all I can do to sit in my seat.

18 Q. All right, I felt that.

19 MR. GORDON: Objection, move to strike judge.

20 THE COURT: Stricken.

21 Q. BY MR. PAUL: Now, you made a comment at one point

22 that Mr. Lucier did not get systemic treatment with the  
23 chemotherapy treatment?

24 A. Yes.

25 Q. Do you remember saying that?

26 A. Yes.

27 Q. What do you mean, he did not get systemic treatment?

28 A. Actually, it's systemic doses -- Of chemotherapy.

6252  
1 And there is a huge difference. Because that CT scan  
2 that showed a dramatic response was in the absence of any  
3 systemic dose of chemotherapy. Mr. Lucier --

4 Q. Hang on. I am going to ask you to slow it down just  
5 a little bit so we know what we're talking about, okay?

6 The dose that he got of Taxol and carboplatin, what  
7 kind of dose did he receive? Can you put it in layman's  
8 terms for us? What are we talking about?

9 A. He received what's called low dose weekly  
10 radio-sensitizing chemotherapy.

11 Q. And what do you mean, radio-sensitizing?

12 A. This is not the sort of chemotherapy that we would  
13 use to treat metastatic disease. It is a small fraction of  
14 the dose, given to make the radiation more effective in the  
15 chest, in the areas that the radiation is directed to.

16 Q. Okay. So, the purpose of giving this low dose was to  
17 assist the radiation, which was being directed at the tumor  
18 in his chest, in his lung?

19 A. Absolutely.

20 Q. Not to treat the entire body?

21 A. That's right. That came later, with full doses of  
22 chemotherapy, after the interval CT.

23 Q. Okay. The interval CT was when?

24 A. It's whenever the date was that we read it off. I

25 don't remember exactly.

26 September, I think.

27 Q. Doctor, okay. September of --

28 A. -- '99. October of '99, whenever -- Whenever it  
6253  
1 was.

2 Q. So the initial dose of Taxol and carboplatin was to  
3 assist the radiation to reduce the mass in the chest,  
4 correct?

5 A. That's correct.

6 Q. And it did the job, correct?

7 A. It did.

8 Q. Okay. Now, why is that important to you, versus  
9 getting a systemic dose? Or giving?

10 A. That these -- These drugs are used in specific ways  
11 to treat different kinds of cancer, and it's like apples and  
12 oranges.

13 They are in this list for treatment of different  
14 cancers. Some of it is first line together. Some of it  
15 is -- Is in somebody who has failed multiple chemotherapies  
16 where one of the drugs is used and not the other. To imply  
17 that these drugs are used as a front-line therapy together  
18 for all these diseases is ludicrous.

19 And they weren't even being given in systemic doses  
20 initially.

21 Q. Okay. All right.

22 Now, you were asked whether or not he had lung  
23 cancer, and you were talking about hilar -- Is the region  
24 that we're talking about that the doctors diagnosed, at  
25 Santa Rosa, is that lung cancer?

26 A. Yes.

27 Q. That hilar mass?

28 A. Yes. Can I explain?

6254

1 Q. Sure.

2 A. The hilum of the lung is part of the lung. A mass

3 that originates in that area is called a hilar mass.

4 It can either be a primary lung cancer -- That's

5 the -- If we stage lung cancer, we have a T, that's "tumor"

6 and N, that's "node" and M, that's "metastasis".

7 It can be the T; it can be the N; it can be the T

8 plus N, N-1.

9 Now, I know this sounds complicated, but it's

10 actually not. We see cases like this all the time. In

11 other words, the hilar mass is the primary lung cancer. It

12 is not uncommon that the bronchoscopy is negative.

13 As a matter of fact, the yield from bronchoscopy in a

14 lot of people's hands is no more than 50 or 60 percent, so a

15 mediastinoscopy was a definitive way to get a tumor in this

16 patient, but it doesn't mean that this mediastinal lymph

17 node came from gastric cancer or breast cancer. I mean,

18 Lord knows, that was back in 1999. This guy has never had a

19 stomach mass; he's never had a breast mass. I mean, this is

20 lung cancer.

21 Q. You're pretty sure about that?

22 A. I'm absolutely sure.

23 Q. Okay. Now, I want to talk to you about a couple of

24 these documents that you were shown.

25 You were shown this, first this letter of June 30,

26 1999. This is Exhibit ACX-000151.

27 This is the letter written June 30, 1999. And if you

28 look at the highlighted area, this letter, to Doctors Mehta

6255

1 and Chung, at that point in time Dr. Jaffee, who was an

2 oncologist, said that Mr. Lucier had adenocarcinoma of the

3 what?

4 A. Of the lung.

5 Can I expand a moment.

6 Q. Sure.

7 A. It was actually in the pathology report called  
8 large-cell, with adenocarcinoma features. That's not  
9 unusual at all. Large cell typically means that he can't  
10 tell for sure if it's squamous or adeno-.

11 Q. Thank you.

12 Now, you were shown this document, September 21,  
13 1999. This is ALC000048.2.

14 This is a letter from Dr. Van Roy to Dr. Jaffee, and  
15 to Dr. Mehta.

16 The highlighted area: "We hope that he has long-term  
17 response and possibly even curability; however, the odds are  
18 very low for long-term longevity and one year or less is  
19 frequently the case."

20 Is that an opinion that you agree with?

21 A. Yes. Although I would say that this information,  
22 even if 1999 was a little dated -- This statement above  
23 this, in the paragraph above where it says, 12 months is  
24 frequently average? Well, the average means that half the  
25 patients did worse and half the patients did better.

26 So there is potential curability, but it's for around  
27 25 percent of patients.

28 Q. Thank you.

6256  
1 Exhibit ALC-000048.3. This is the letter dated  
2 September 22nd, 1999, which you were shown. I want to show  
3 you this letter for a purpose.

4 Doctor Jaffee wrote: "I think his prognosis -- That  
5 his prognosis is a lot better than it was at the outset.  
6 Although one doesn't usually speak of cure in this  
7 situation, I think that the expectation of cure is there.

8 Of course, statistically that may not be possible."

9 It was a year and four months after this that he had  
10 metastasis to the brain, correct?

11 A. That's right.

12 Q. He wasn't cured back then, was he?

13 A. No.

14 Q. This is your letter to Dr. Cavalcant, April 26, 2000,  
15 ALC-000903.

16 First paragraph: When you wrote to him April 26,  
17 2000, you said that he was in the clinic for follow up of  
18 his lung cancer, correct?

19 A. That's correct.

20 Q. As you know, this is -- This is a 50-year-old  
21 gentleman who is diagnosed with stage 3-A non-small-cell  
22 lung cancer last year.

23 And you go through the treatment that he had  
24 received, correct?

25 A. Yes.

26 Q. Your opinion change since April of 2000 as to what  
27 his condition is?

28 A. No.

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1 Q. You also put down on this exhibit that he was  
2 currently unemployed and on disability, correct?

3 A. Yes.

4 Q. In fact, he's on Social Security disability, isn't  
5 he?

6 A. I -- I'm not sure at the present time.

7 MR. GORDON: Judge, beyond the scope.

8 THE COURT: Sustained.

9 MR. PAUL: All righty.

10 Radiology report, this is ACX-000185.

11           The date on this is 11 February, I guess, the exam  
12  date of 2002.

13           You talked to us about radiation fibrosis?

14  A.       Yes.

15  Q.       On this report, radiology report, does it say where  
16  this is fibrosis?

17  A.       Yes.

18  Q.       The right what?

19  A.       Right lower lobe.

20  Q.       And what does No. 2 say?

21  A.       Well, that's what we were just talking about, "right  
22  lower lobe prognosis, probably post-secondary" --

23  Q.       Hold on. Let me make sure -- I'm reading "upper",  
24  and you're saying "lower"?

25  A.       I'm sorry. That's just my --

26  Q.       That was my confusion?

27  A.       That's my confusion as well. It says "right upper  
28  lobe".

6258

1  Q.       "Right upper lobe fibrosis, possibly to radiation"?

2  A.       Left or lower score -- I think I was probably  
3  getting confused.

4  Q.       Left lower lobe was where this cancer mass was back  
5  in 1999?

6  A.       Yes.

7           MR. GORDON: Could we have three read, Mr. Paul.

8           MR. PAUL: You read it. Why don't you ask him about  
9  it, if you want it read again.

10          THE COURT: Please, Mr. Paul.

11          MR. PAUL: All right. Radiology report of March 5,  
12  2002. This is ALC-000040.13. You were asked about this.  
13  CT of the chest that was done.

14          Do you remember that?

15 A. Yes.

16 Q. You made an -- They listed an impression; is that  
17 correct?

18 A. Yes.

19 Q. The impression was: "Traumatic interval increase in  
20 the size of right hilar soft-tissue mass with adjacent" --  
21 You're going to have to say that word for me.

22 A. "Bronchiectasis".

23 Q. -- "And scarring. Given its rapid appearance and  
24 the patient's history of radiation therapy, this most likely  
25 represents severe radiation pneumonitis."

26 That was the term that you had used before, correct?

27 A. Correct. I should point out that "traumatic" here is  
28 actually a typo. It's actually "dramatic".

6259

1 Q. "Dramatic". Okay.

2 A. "Dramatic".

3 Q. "Please note however that the underlying neoplasia  
4 cannot be excluded in the setting, and follow-up imaging is  
5 recommended after appropriate treatment." Correct?

6 A. Right.

7 Q. All right. Then, you were shown Exhibit  
8 ALC-000004.18. This is another radiology report.

9 This one was now done 6th of May, 2002. That's the  
10 date of the exam.

11 This was after treatment of -- I guess they gave  
12 antibiotics, correct?

13 A. That's correct. And bronchodilator.

14 Q. And it says there has been a near complete resolution  
15 of the previously noted right hilar mass.

16 The question I want to ask you here: I get the  
17 implication that maybe this mass that was found in 1999 was

18 just a pneumonitis? Do you think it was a pneumonitis back  
19 in 1999?

20 A. No. As a matter of fact, there was pneumonitis  
21 extending out from the mass. It was commented on the  
22 reports, if I remember correctly. But the mass was the  
23 mass. That was undoubtedly his primary cancer, and I'm  
24 quite confident of that.

25 Q. Okay. So, we put this all in a nutshell: You're his  
26 treating physician, right?

27 A. Yes.

28 Q. You've given us what your diagnosis is, correct?  
6260

1 A. Yes.

2 Q. You've been asked a lots of questions.

3 You change your diagnosis in this courtroom?

4 A. No.

5 Q. Lung cancer, it's metastasized to the mediastinum,  
6 that metastasized to the brain?

7 A. That's correct.

8 Q. Any question in your mind?

9 A. None whatsoever.

10 MR. PAUL: Thank you.

11 THE COURT: Mr. Gordon.

12 MR. GORDON: Thank you, Judge.

13 RECROSS EXAMINATION

14 BY MR. GORDON, Counsel for the Defendant RJ Reynolds:

15 Q. Dr. Gandara, it's true, isn't it, that even if a full  
16 dose of chemotherapist wasn't given initially, if I hear you  
17 right, a full dose of chemotherapy was eventually given to  
18 Mr. Lucier, correct?

19 A. Yes. After the CT we talked about.

20 Q. Okay. Fair enough.

21 By the way, Doctor, have you ever seen the pathology

22 report of a Dr. Hammar in this case?

23 A. No.

24 Q. Have you have you ever seen a pathology report of a  
25 Dr. Brantley?

26 A. No.

27 Q. Barsky?

28 A. I'm just a poor treating physician; I'm not an expert  
6261  
1 witness in this case. I haven't seen any of those things.

2 Q. Okay. Very good.

3 You talked about radiation pneumonitis causing a  
4 flare-up or enlargement in Mr. Lucier's lymph nodes,  
5 correct?

6 A. Yes.

7 Q. As we also discussed, it's true, isn't it, that an  
8 infection process, apart from radiation pneumonitis, whether  
9 it was 1999 or some other time, can also cause adenopathy,  
10 correct?

11 A. Yes, that's actually part of this.

12 Q. I understand it's part of it, but apart from a  
13 process that began with radiation pneumonitis, it's fair,  
14 isn't it, that if Mr. Lucier never had radiation therapy but  
15 he had some sort of respiratory infection, pneumonia or  
16 bronchitis --

17 A. Yes.

18 Q. -- Does that mean that could even lead to enlarged  
19 lymph nodes?

20 THE WITNESS: Am I allowed to finish my statement?

21 THE COURT: Just answer the question, please.

22 THE WITNESS: Yes.

23 Q. BY MR. GORDON: Does that lead to enlarged lymph  
24 nodes?

25 A. Yes.

26 (A brief discussion was held off the record between  
27 Mr. Gordon and Mr. Paul.)

28 Q. BY MR. GORDON: Doctor, it's true, isn't it, that  
6262 1 when you recommended to Mr. Lucier that he attend U.C.

2 Davis's cessation clinic, that at least at the time of your  
3 deposition, he did not avail himself of this clinic; isn't  
4 that correct?

5 MR. PAUL: Your Honor, I object; beyond the scope of  
6 redirect.

7 THE COURT: I'll allow you to reopen for that one  
8 area.

9 Q. BY MR. GORDON: It's true, isn't it, that at the time  
10 of the your deposition that you may have made a  
11 recommendation to Mr. Lucier that he attend a smoking-  
12 cessation clinic, but for whatever reason at that time, he  
13 did not choose to avail himself of that treatment; isn't  
14 that correct?

15 A. That's correct.

16 Q. Mr. Paul just briefly went through this, March, 2002.  
17 We're in March, 2002 now, CT report, and he read you the  
18 first paragraph or walked through the first paragraph of the  
19 impressions section, which concludes: "Please note,  
20 however, that underlying neoplasia cannot be excluded in  
21 this setting, and follow-up imaging is recommended after  
22 appropriate treatment."

23 Did I read that correctly?

24 A. Yes.

25 Q. It's the case that Mr. Lucier was treated in  
26 antibiotics at that time, correct?

27 A. Yes.

28 Q. And we saw subsequent CT scan that showed a complete

6263

1 resolution of the hilar mass that was detected at that time,

2 correct?

3 A. That's correct.

4 Q. This is February of 2002.

5 We talked about the radiation fibrosis observation

6 and the impressions section.

7 No. 3 indicates that no pulmonary nodules or masses

8 were found at that time based on this CT, correct?

9 A. Yes.

10 Q. Mr. Paul also walked you through Mr. --

11 Dr. Van Roy's letter -- I believe it was this one -- Where

12 he notes at this time, at least, that assuming Mr. Lucier

13 had lung cancer, he doesn't say that, but we -- "Assuming

14 that's the case, average survival for a stage 3 lung cancer

15 is 12 months."

16 Do you see that?

17 A. I see it.

18 Q. And it's true, isn't it, that, based on Mr. Lucier's

19 response to chemotherapy treatment and the fact that,

20 thankfully, he's still with us, that he continues to be the

21 exception and not the rule, doctor; isn't that correct?

22 A. Well, as I mentioned in the earlier testimony, that

23 statement about 12 months is actually dated, even for 1999.

24 Q. Even if we update it, isn't it true that Mr. Lucier's

25 continued survival continues to defy the odds, the

26 statistics for stage 3 and then stage 4 lung cancer?

27 A. Well, the average survival, the median survival on a

28 study now where we have just about the same amount of

6264

1 follow-up for similar patients to Mr. Lucier, that median

2 survival is 26 months.

3 So what I'm saying is: Time is marching on; times

4 are getting better. The 12-month time is not an accurate  
5 reflection even for 1999.

6 MR. GORDON: Judge, move to strike.

7 Q. Even if 12 months in Dr. Van Roy's letter was a bit  
8 dated and optimistic, it's true, based on the general  
9 statistics, he continues to be the exception and not the  
10 rule, correct?

11 A. No.

12 MR. GORDON: I have no further questions, Judge.

13 THE COURT: Okay, Ms. Fey.

14 MS. FEY: Your Honor, no questions.

15 MR. PAUL: Nothing further, your Honor; thank you.

16 THE COURT: You may step down.

17 THE WITNESS: Thank you.

18 THE COURT: We'll take the evening recess. Please  
19 don't discuss the case. Thank you for your patience. We  
20 don't start tomorrow until 10:00 o'clock, 10:00 o'clock  
21 tomorrow morning. Have a nice evening.

22 (The jury departs.)

23 THE COURT: Okay. The jury's gone. Anything else  
24 this afternoon?

25 MR. BARRON: One second, your Honor.

26 (A brief discussion was held off the record between  
27 Mr. Barron and Mr. Gordon and Mr. Grossman.)

28 MR. BARRON: That's it, your Honor. Nothing.

6265 1 MR. PAUL: God night, your Honor.

2 MS. FEY: Good night.

3 (All say "good night".)

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